82-6923

JUN 14 1983
ALEXANDER L. STEVAS
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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ALVIN BERNARD FORD,

Petitioner,

-v-

CHARLES G. STRICKLAND, JR., Warden, Florida State Prison; LOUIE L. WAINWRIGHT, Secretary, Department of Offender Rehabilitation, State of Florida; JIM SMITH, Attorney General, State of Florida,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Alvin Bernard FORD, Petitioner,

v.

Charles G. STRICKLAND, Jr., Warden Fla. State Prison, Louie L. Wainwright, Secretary, Department of Offender Rehabilitation, State of Fla., Jim Smith, Attorney General, State of Florida, Respondents.

No. 81-6200.

United States Court of Appeals, Eleventh Circuit.

Jan. 7, 1983.

Death row inmate sought federal habeas relief. The United States District Court for the Southern District of Florida, Norman C. Roettger, Jr., J., denied relief, and inmate appealed. The Court of Appeals held that: (1) Florida Supreme Court decision denying habeas corpus relief to class of death row inmates, of which petitioner was member, on direct petition for writ of habeas corpus alleging unconstitutional receipt of nonrecord materials during pendency of appeals was dispositive of inmate's claim that nonrecord materials were used and that such practice violated constitution; (2) failure, if any, to consider nonstatutory mitigating testimony did not create substantial likelihood of actual prejudice; (3) application of harmless error rule in refusing to order resentencing when three of eight aggravating circumstances for imposition of death penalty were found inapplicable on appeal was constitutionally permissible; (4) failure to raise confession issue on direct appeal waived consideration on habeas corpus petition; (5) statutory requirement for imposition of death penalty that aggravating circumstances outweigh mitigating circumstances was not element of crime of capital murder; (6) appellate review of inmate's death sentence was not arbitrary, capricious or in disaccord with constitutional principles; and (7) inmate had failed to carry burden of proving ineffective assistance of counsel at sentencing.

Affirmed and remanded.

Opinion, 676 F.2d 434, vacated.

Roney, Circuit Judge, filed separate opinion in which James C. Hill, Fay, Vance and Albert J. Henderson, Circuit Judges, joined.

Godbold, Chief Judge, dissented in part and specially concurred in part and filed opinion in which Clark, Circuit Judge, joined except as to concurrence in Part V of majority opinion.

Tjoflat and Kravitch, Circuit Judges, concurred in part and dissented in part and filed opinions.

Johnson, Circuit Judge, concurred in part and dissented in part and filed opinion.

R. Lanier Anderson, III, Circuit Judge, concurred in part and dissented in part and filed opinion in which Clark, Circuit Judge, concurred as to Section B.

1. Habeas Corpus ⇐113(10)

Considering death row inmate's request, after full briefing, extended oral argument, and several months of deliberation on habeas corpus petition, that all appellate proceedings cease and that state judgment be carried out as motion to dismiss appeal, motion was untimely. F.R.A.P. Rule 42(b), 28 U.S.C.A.

2. Habeas Corpus ⇐117(1)

Where petitioning death row inmate was member of class of death row inmates previously denied relief on direct petition for writ of habeas corpus alleging unconstitutional receipt of nonrecord materials concerning them during pendency of appeals of their capital cases, such decision, which held that state law did not permit use of such nonrecord material in appellate review of a capital sentence and that nonrecord material was not used in contravention of state law, was dispositive of inmate's entitlement to habeas corpus relief on individual petition claiming ex parte review of psychiatric evaluations or contact notes, psychological screening reports, postsentencing investigation reports and state prison classification and admission summaries in review of his sentence and that such practice violated constitution. 28 U.S.C.A. § 2254; U.S.C.A. Const.Amends. 5, 6, 14.

3. Habeas Corpus ⇐85.5(15)

Death row inmate, who alleged that instructions on mitigating circumstances precluded consideration of nonstatutory mitigating factors, had failed to carry burden on petition for habeas corpus of establishing that jury perceived that in deciding whether to recommend life or death it was denied use of nonstatutory mitigating factors where trial court read statute as written, which had previously been recognized not to limit jury's consideration of mitigating circumstances to those listed in statute, introduction of evidence which might be considered mitigating was not limited, and jury arguments encompassed all evidence introduced. 28 U.S.C.A. § 2254.

4. Habeas Corpus ⇐30(1)

Failure to consider testimony by defendant's mother and girl friend about his family life, education, and work history and testimony by psychiatrist portraying defendant as bright young man frustrated by dyslexia would not create substantial likelihood that there was actual and substantial disadvantage to defendant, and therefore defendant, who admitted that issue was not raised either at trial or on direct appeal, had failed to show that instructions on mitigating circumstances, which allegedly improperly precluded consideration of nonstatutory mitigating factors, prejudiced him with jury as required to decide adequacy of instructions on petition for habeas corpus. 28 U.S.C.A. § 2254.

5. Habeas Corpus ⇐45.2(2)

Application of harmless error rule by Florida Supreme Court in refusing to order resentencing when three of eight aggravating circumstances in support of death sentence, two of which lacked evidentiary support and one of which was based on same aspect of crime as another circumstance, were ruled inapplicable was constitutionally permissible where no mitigating circumstance was found and five of statutory aggravating circumstances relied upon by sentencing judge were upheld.

6. Criminal Law ⇐641.13(6)

Reasonably effective assistance of counsel was rendered in defense attorney's attempt to win suppression of defendant's oral confession. U.S.C.A. Const.Amend. 6.

7. Criminal Law ⇐1166.11

Even if attorney's representation in attempting to win suppression of defendant's oral statement to police had fallen short of dictates of Sixth and Fourteenth Amendments, defendant was not prejudiced by any action or inaction of his attorney where statement admitted only presence and participation in robbery and denied participation in shooting, and there was abundant evidence, apart from confession, to place defendant at scene as participant. U.S.C.A. Const.Amends. 6, 14.

8. Criminal Law ⇐998(3)

Under Florida law, criminal defendant's failure to raise issue which could be asserted on direct appeal precludes consideration of issue on motion for postconviction relief. West's F.S.A. Rules Crim.Proc., Rule 3.850.

9. Habeas Corpus ⇐45.3(1)

State prisoner can forego opportunity to raise constitutional issues in habeas corpus proceedings by deliberately bypassing

state appellate procedural rules or by merely failing to follow them without showing both cause for default and prejudice resulting from it. 28 U.S.C.A. § 2254.

10. **Habeas Corpus** ⇐25.1(1)

For purpose of *Sykes*, i.e., that absent showing of both cause for noncompliance and actual prejudice habeas corpus relief is barred because of procedural default in state proceeding, "cause" is defined in light of determination to avoid miscarriage of justice, while "prejudice" means actual prejudice. 28 U.S.C.A. § 2254.

See publication Words and Phrases for other judicial constructions and definitions.

11. **Habeas Corpus** ⇐25.1(8)

Death row inmate's failure to raise oral confession issue on direct appeal waived consideration on habeas corpus petition where claim was perceived and asserted in trial court, accuracy of the statement was not contested, and, in light of abundant evidence apart from confession to place defendant at scene, inmate was not prejudiced by admission. 28 U.S.C.A. § 2254.

12. **Homicide** ⇐7

Florida statutory requirement, for imposition of death penalty, that aggravating factors outweigh mitigating factors was not an element of crime of capital murder under Florida law. West's F.S.A. § 921.-141(1), (3)(b).

13. **Criminal Law** ⇐749

Process of weighing aggravating and mitigating circumstances in sentencing is matter for judge and jury and not susceptible to proof by either party. West's F.S.A. § 921.141(1), (3)(b).

14. **Habeas Corpus** ⇐113(9, 11)

Where claim of unconstitutionality of death sentence for failure to require proof of existence of aggravating circumstances beyond reasonable doubt was never specifically briefed or raised before panel, it was not properly before Court of Appeals en banc on rehearing of death row inmate's petition for habeas corpus. West's F.S.A. § 921.141(1), (3)(b); 28 U.S.C.A. § 2254.

15. **Homicide** ⇐354

Under Florida law, existence of aggravating circumstances, for imposition of death penalty, must be proved beyond reasonable doubt. West's F.S.A. § 921.141(1), (3)(b).

16. **Habeas Corpus** ⇐92(1)

Where in a capital punishment case state courts have acted through a properly drawn statute with appropriate standards to guide discretion, federal courts will not undertake case-by-case comparison of facts in given case with decisions of state Supreme Court, even though, were aggravating and mitigating circumstances to be retried, results different from those reached in state courts might be reached.

17. **Courts** ⇐91(1)

Supreme Court of Florida was ultimate authority on Florida law, and Court of Appeals did not sit, on Florida inmate's petition for habeas corpus, to question Florida Supreme Court's interpretation of Florida statutes. 28 U.S.C.A. § 2254.

18. **Habeas Corpus** ⇐45.1(4)

Review by Florida Supreme Court of death row inmate's death sentence was not arbitrary, capricious or in disaccord with constitutional principles relating to sentencing in capital cases.

19. **Habeas Corpus** ⇐113(12)

Under habeas corpus statute, Court of Appeals presumes correct the facts properly found by state courts. 28 U.S.C.A. § 2254(d).

20. **Habeas Corpus** ⇐92(1)

In reviewing ineffective assistance of counsel claims, federal habeas court does not sit to second-guess considered professional judgments with benefit of 20/20 hindsight. 28 U.S.C.A. § 2254; U.S.C.A. Const.Amend. 6.

21. **Criminal Law** ⇐641.13(1)

Even where attorney's strategy may appear wrong in retrospect, finding of constitutionally ineffective representation is not automatically mandated. U.S.C.A. Const.Amend. 6.

22. Criminal Law ⇐641.13(2)

That counsel for criminal defendant has not pursued every conceivable line of inquiry in case does not constitute ineffective assistance of counsel. U.S.C.A. Const. Amend. 6.

23. Habeas Corpus ⇐85.5(11)

Record revealed that death row inmate, who alleged that attorney failed to focus trial judge's and jury's attention on critical factors relevant to sentence determination, received constitutionally adequate representation and no prejudice resulted to him by any action or inaction of counsel, and therefore inmate had not carried burden on petition for habeas corpus of proving ineffective assistance of counsel. 28 U.S.C.A. § 2254; U.S.C.A. Const.Amend. 6.

Richard H. Burr, III, West Palm Beach, Fla., Marvin E. Frankel, New York City, for petitioner.

Joy B. Shearer, Asst. Atty. Gen., West Palm Beach, Fla., Charles Corces, Jr., Asst. Atty. Gen., Tampa, Fla., for respondents.

Appeal from the United States District Court for the Southern District of Florida.

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, ANDERSON and CLARK, Circuit Judges.*

PER CURIAM:

This cause, after a decision by a panel, 11th Cir., 676 F.2d 434, was taken en banc for the purpose of resolving for this Circuit several important issues that repeatedly arise in capital cases. After full briefing, extended oral argument, and several months of deliberation during which the judges of the Court sought to resolve and reconcile the various issues involved, a communication was received purporting to be a request by defendant Ford that all appellate proceedings cease and that the state judgment be carried out.

[1] The Court determines that, considering Ford's communication as a motion to dismiss his appeal, the motion is untimely. Fed.R.App.P. 42(b).

The United States Supreme Court has accepted certiorari of *Barclay v. Florida*, 411 So.2d 1310 (Fla.1982), *cert. granted*, ——— U.S. ———, 103 S.Ct. 340, 74 L.Ed.2d ——— (1982) which may involve an issue in this case. Although this Court affirms the denial of habeas corpus relief on all grounds, we remand the case to the district court to consider the effect that *Barclay* may have on the denial of habeas corpus relief in this case, and the procedure that should be followed in the district court while the *Barclay* case is pending in the Supreme Court. If a stay of execution is requested pending consideration of the *Barclay* issue, the district court shall entertain such request.

The court *sua sponte* stays issuance of the mandate to and including March 1, 1983, to permit the filing of a petition for writ of certiorari to the United States Supreme Court, if either party wishes to do so, the stay to continue in force until the final disposition of this case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate on the filing of a copy of an order of the Supreme Court denying the writ, or on the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time. The mandate will affirm the judgment of the district court but remand the case for further proceedings consistent with this opinion.

Since various judges comprise the majority for affirmance on the separate issues decided by this Court, we set forth the following table for easier consideration of the following opinions:

* Judge Joseph W. Hatchett was disqualified because of his participation in the case while a Justice of the Supreme Court of Florida.

ISSUE I: *The Brown Issue*

Affirm: Roney, Tjoflat (by separate opinion), Hill, Fay, Vance and Henderson.

Dissent: Godbold, Kravitch, Johnson, Anderson and Clark.

ISSUE II: *Instructions on Mitigating Circumstances*

Affirm: Godbold (by separate opinion, with which Clark concurs), Roney, Tjoflat (by separate opinion), Hill, Fay, Vance, Johnson, Henderson and Anderson.

Dissent: Kravitch.

ISSUE III: *Failure to Require Resentencing When Evidence Insufficient on Some Aggravating Circumstances*

Affirm: Godbold (by separate opinion, with which Clark concurs), Roney, Hill, Fay, Vance and Henderson.

Dissent: Kravitch and Johnson.

Tjoflat and Anderson would certify a question of state law to the Florida Supreme Court before ruling on this issue.

ISSUE IV: *Admission of Ford's Oral Confession*

Affirm: The Court is unanimous to affirm on this issue.

ISSUE V: *Standard by Which Aggravating Circumstances Must Outweigh Mitigating Factors*

Affirm: Godbold, Roney, Tjoflat (by separate opinion), Hill, Fay, Vance, Kravitch (by separate opinion), Johnson and Henderson.

Dissent: Anderson and Clark.

ISSUE VI: *Florida Supreme Court's Standard of Review*

Affirm: The Court is unanimous to affirm on this issue.

ISSUE VII: *Assistance of Counsel at Sentencing*

Affirm: The Court is unanimous to affirm on this issue.

AFFIRMED AND REMANDED.

RONEY, Circuit Judge, with whom JAMES C. HILL, FAY, VANCE and ALBERT J. HENDERSON, Circuit Judges, join, and other judges join in part as shown by their separate opinions:

Alvin Bernard Ford, convicted in Florida of murdering a Fort Lauderdale policeman, petitioned the federal district court for a writ of habeas corpus pursuant to 28 U.S.C.A. § 2254. A panel of this Court affirmed the district court's denial of relief, rejecting all seven grounds raised by petitioner on appeal. *Ford v. Strickland*, 676 F.2d 434 (11th Cir.1982).[1] A rehearing *en banc* was granted to examine several important recurring issues in habeas corpus petitions filed by Florida death row inmates. We now affirm the denial of habeas corpus relief but remand the case to the district court for further proceedings as set forth in the per curiam opinion of the Court.

Briefly, the facts which gave rise to petitioner's conviction and sentence are as follows. On the morning of July 21, 1974, Ford and three accomplices entered a Red Lobster Restaurant in Fort Lauderdale, Florida, to commit an armed robbery. During the course of the robbery, two people escaped from the restaurant. Fearing police would soon arrive, petitioner's accomplices fled. Ford remained to complete the theft of approximately $7,000 from the restaurant's vault.

Officer Dimitri Walter Ilyankoff arrived on the scene. Petitioner allegedly shot him twice in the abdomen and, apparently realizing his accomplices had abandoned him,

1. The petition for writ of habeas corpus alleged essentially seven contentions: (1) improper admission of an oral confession; (2) failure of the Florida Supreme Court to require resentencing when it found three of the statutory aggravating circumstances unsupported by the evidence; (3) improper state trial court instructions on mitigating circumstances; (4) failure of the Florida death law to require a finding that aggravating circumstances must outweigh mitigating circumstances beyond a reasonable doubt; (5) failure of the Florida Supreme Court to apply a consistent standard of reviewing the aggravating and mitigating circumstances in the case; (6) ineffective assistance of counsel at sentencing; and (7) review by the Florida Supreme Court of nonrecord materials in death cases, the so-called *Brown* issue.

ran to the parked police car. Because there were no keys in the car, Ford ran back to the struggling, wounded officer. Petitioner asked Officer Ilyankoff for the keys and then allegedly shot him in the back of the head at close range. Ford took the keys and made a high speed escape.

Petitioner was convicted in Circuit Court, Broward County, Florida, of first degree murder. In accordance with the jury's recommendation, the trial judge sentenced him to death. On direct appeal both the conviction and sentence were affirmed. *Ford v. State*, 374 So.2d 496 (Fla.1979). The United States Supreme Court denied Ford's petition for writ of certiorari. *Ford v. Florida*, 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980).

Petitioner thereafter joined with 122 other death row inmates in filing an application for extraordinary relief and petition for writ of habeas corpus in the Florida Supreme Court. The petitioners challenged the court's alleged practice of receiving nonrecord information in connection with review of capital cases. The Florida Supreme Court denied the petition, *Brown v. Wainwright*, 392 So.2d 1327 (Fla.1981), and the United States Supreme Court denied certiorari, *Brown v. Wainwright*, 454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981).

Ford then filed a motion for post-conviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure and applied for a stay of execution. Relief was denied. *Ford v. State*, 407 So.2d 907 (Fla. 1981).

Finally, petitioner filed a petition for writ of habeas corpus under 28 U.S.C.A. § 2254 in the United States District Court for the Southern District of Florida. The district court denied relief, and the panel affirmed. *Ford v. Strickland*, 676 F.2d 434 (11th Cir. 1982). We granted *en banc* consideration which vacates the panel's opinion.

I.

The *Brown* Issue: *Nonrecord Material Before The Florida Supreme Court*

In *Brown v. Wainwright*, 392 So.2d 1327 (Fla.), *cert. denied*, 454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981), the Florida Supreme Court with a full opinion denied Ford and 122 other Florida death row inmates class relief on a direct petition for writ of habeas corpus alleging the Supreme Court of Florida had unconstitutionally received nonrecord materials concerning death row inmates during the pendency of the appeals of capital cases.

Ford asserts that same issue here, specifically claiming that in his case the Florida Supreme Court reviewed *ex parte* psychiatric evaluations or contact notes, psychological screening reports, post-sentence investigation reports and state prison classification and admission summaries. This practice, he contends, violated the Constitution because it precluded adversarial testing of the information in violation of his rights to due process of law, effective assistance of counsel, confrontation, and reliability and proportionality of capital sentencing. He argues the court's receipt of results of psychiatric examinations which were conducted without first informing him of his Fifth Amendment rights violated his privilege against self-incrimination and his right to confer with his attorney before determining whether to submit to them.

The crux of Ford's assertion is that somehow the nonrecord materials were used in connection with the review of his sentence. The use of such materials would, it is argued, run afoul of the principles of *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), which held that a death sentence may not be *imposed* to any extent on nonrecord, unchallengeable information. A collateral argument would fault the use of such materials in other capital cases, even if not used in Ford's case, on the ground that such use in any case would upset the proportionality requirement that every case be considered on review in relationship to all other death cases. *See Proffitt v. Florida*, 428 U.S. 242, 258, 96 S.Ct. 2960, 2969, 49 L.Ed.2d 913 (1976); *State v. Dixon*, 283 So.2d 1, 10 (Fla.1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).

For the determination of this issue, we assume without deciding a point of law and

a point of fact. As to the law we assume without deciding that the use by the appellate court of the type of nonrecord material alleged here would be unconstitutional. The judges who join this opinion have mixed tendencies as to the correct law on this point.[2] In order to decide this case, however, we find it unnecessary as judges or as a court to determine the law in this regard.[3]

As to a point of fact, we assume without deciding the Florida Supreme Court received such information, and that it was available to the members of the court. The court itself assumed as much in its consideration of the allegations in *Brown v. Wainwright*, 392 So.2d at 1331 ("Even if petitioners' most serious charges were accepted as true . . ."). Such assumption by us eliminates the necessity for any kind of an evidentiary hearing or other fact-determining inquiry of the Florida court to determine the truth of the allegations.

With these assumptions, the inquiry from a constitutional standpoint is *first*, whether state law permits the use of such materials; *second*, if not, was the material nevertheless used in contravention of state law; and *third*, if not intentionally used in the review of capital cases, did the reading of such information somehow affect the judgment of the members of the Florida Supreme Court so that a federal court should treat the case as if the information had in fact been used. Only if one of these three questions is answered in the affirmative, would we be faced with the question of whether the Constitution was violated.

[2] *Does Florida state law permit the use of such nonrecord material in the review of Ford's sentence, or any other capital sentence?* The ultimate source of any state's law is found in the decisions of its highest court. *See Tennon v. Ricketts*, 574 F.2d 1243 (5th Cir.1978), *cert. denied*, 439 U.S. 1091, 99 S.Ct. 874, 59 L.Ed.2d 57 (1979).[3] There are times when a state's supreme court has not yet decided a point of law so that the decisions of lower courts, statutes and other sources must suffice. There are other times when decisions by the state's court of last resort, not being clearly on point, must themselves be interpreted for a federal court to determine what the state court would decide on the precise point. The task is easy here because the Supreme Court of Florida has decided the "case on all fours" with this one in *Brown v. Wainwright*, 392 So.2d 1327 (Fla.), *cert. denied*, 454 U.S. 1000, 102 S.Ct. 542, 71 L.Ed.2d 407 (1981). In *Brown*, the court held that state law does not permit the use of such nonrecord material in the appellate review of a capital sentence.

> [A]s a matter of law our view of the non-record information petitioners have identified is totally irrelevant either to our appellate function in capital cases as it bears on the operation of the statute, or to the validity of any individual death sentence.

392 So.2d at 1331.

> The record of each proceeding, and precedent, necessarily frame our determinations in sentence review . . . . Factors or information outside the record play no part in our sentence review role.

Id. at 1332.

For a federal court, regardless of the reasons relied on and whether the law an-

2. At least three bases of unconstitutionality are asserted: first, the practice would be inconsistent with the United States Supreme Court's past insistence on strict procedural regularity in the imposition and review of capital sentences; second, much of the alleged information may be inadmissible and unreliable hearsay, which petitioners should have the opportunity to cross-examine; and third, some of the material may be inadmissible under *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981) (psychiatrist's testimony concerning court ordered examination for competency to stand trial inadmissible at capital sentencing phase under Fifth and Sixth Amendments). *See Brown v. Wainwright*, 454 U.S. 1000, 1001, 102 S.Ct. 542, 543, 70 L.Ed.2d 407, 408 (1981) (J. Marshall, dissenting.) To some extent the decision turns on whether the Florida Supreme Court is "imposing" sentence or doing something qualitatively different. *See Brown v. Wainwright*, 392 So.2d at 1331.

3. The Eleventh Circuit, in the en banc decision of *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981), adopted as precedent the decisions of the former Fifth Circuit decided prior to October 1, 1981.

nounced is good or bad law, the decision by the Florida court concludes the point.

Was the material used in contravention of state law? The federal court must be content with the answer that it was not so used for these reasons. First, there is a presumption of regularity in state proceedings, which would seem to rise to its highest level in considering the work of the highest court of the state. *See* 28 U.S.C.A. § 2254(d); *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981). We presume the state supreme court follows its own law and procedures. Second, Ford was a class petitioner for writ of habeas corpus to the Florida Supreme Court in *Brown*, where the court effectively stated that non-record material was not used in the review of petitioners' cases.[4] Third, there has been no specific allegation that Ford's case was treated differently from all others. *See Ford v. Strickland*, 676 F.2d at 444. Fourth, it is obnoxious both to the traditional role and procedures of the appellate process and to current notions of comity and federalism to suggest that a state appellate judge should be required to respond in a federal court to questions concerning what was or was not considered by him in the review of a state case. Petitioner virtually admits his argument would eventually carry that far if all else failed in obtaining the proof of what he asserts. Any principle that supports the start of that journey would support a conclusion which is not now a part of American law.

Would reading the nonrecord material so affect the Florida judges that the federal court should, for constitutional review purposes, treat the case as if the information had been used by them? The Florida court has given the answer to that question in the *Brown* decision.

> A remaining question is whether the reading of non-record documents would so affect members of this Court that they could not properly perform their assigned appellate functions. Plainly, it would not. Just as trial judges are aware of matters they do not consider in sentencing, *Alford v. State*, 355 So.2d 108 (Fla.), *cert. denied*, 436 U.S. 935, 98 S.Ct. 2835, 56 L.Ed.2d 778 (1978), so appellate judges are cognizant of information that they disregard in the performance of their judicial tasks.

Id. at 1333. That judges are capable of disregarding that which should be disregarded is a well accepted precept in our judicial system. *Harris v. Rivera*, 454 U.S. 339, 345, 102 S.Ct. 460, 464, 70 L.Ed.2d 530, 536 (1981).

The Florida Supreme Court has left unanswered the perplexing question asked in Justice Marshall's dissent to the denial of certiorari in the *Brown* case, 454 U.S. 1000, 1001, 102 S.Ct. 542, 543, 70 L.Ed.2d 407, 408, to-wit:

> If the court does not use the disputed non-record information in performing its appellate function, why has it systematically sought the information?

A candid answer would have been better than the veiled suggestion in footnote 17 of the *Brown* opinion, 392 So.2d at 1333. ("The 'tainted' information we are charged with reviewing was, as counsel concedes, in every instance obtained to deal with newly-articulated procedural standards.") But even if members of the court solicited the material with the thought it should, would or might be used in the review of capital sentences, the decision of the Florida court that it should not be so used, the statement that it was not used, and the rejection of the notion that it affected the judgment of the reviewing judges of the court ends the matter when addressed at the constitutional level.

II.

Instructions on Mitigating Circumstances

Instructing the jury on *aggravating* circumstances, the trial judge stated, "[y]ou

4. It is worth noting here that the members of the court who reviewed Ford's sentence on direct appeal, Justices England, Adkins, Boyd, Overton, Sundberg, and Hatchett, *Ford v. State*, 374 So.2d 496 (Fla.1979), were, but for one, all members of the court which considered the petition for writ of habeas corpus. *Brown v. Wainwright*, 392 So.2d at 1334.

shall consider only the following . . .," and read the statutory language. With regard to mitigating circumstances, he said, "[y]ou shall consider the following . . ." omitting the word "only" and again reading the appropriate statutory language. Ford neither objected to the instruction at trial nor raised it on direct appeal.

Relying primarily on *Washington v. Watkins*, 655 F.2d 1346 (5th Cir.1981), *cert. denied*, — U.S. —, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982), petitioner argues the above instructions limited the jury's consideration to statutory mitigating factors, precluding consideration of nonstatutory mitigating factors contrary to *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). *Lockett* held "the sentencer . . . [must] not be precluded *from considering, as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." 438 U.S. at 604, 98 S.Ct. at 2964.

Petitioner concedes procedural default on this issue, admitting that it was raised neither at trial nor on direct appeal. The panel noted the fact that "Ford neither objected to the instruction at trial nor raised it on appeal," but did not decide whether the objection had been waived. 676 F.2d at 440.

The proper inquiry as to waiver of the objection should be whether Ford comes within the cause and prejudice exception to *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). Ford contends he cannot be faulted for failing to raise the issue, arguing the grounds for objecting were unknown at trial because Florida Supreme Court decisions decided prior to trial indicated only statutory mitigating circumstances could be considered. The court ruled explicitly to this effect two years after trial in *Cooper v. State*, 336 So.2d 1133, 1139 & n. 7 (Fla.1976), *cert. denied*, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977). *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), a direct reversal of this view, was not decided until two years later (four years after trial) and hence was unavailable as a basis for objection. In light of our determination that Ford has not met the prejudice prong of *Sykes*, we need not determine whether the cause prong has been met. *See United States v. Frady*, — U.S. —, —, 102 S.Ct. 1584, 1594, 71 L.Ed.2d 816 (1982).

The *Sykes* issue becomes blurred in this case, however, because of two principles which mesh to deny Ford relief on this point. First, the Supreme Court has held that an erroneous jury instruction satisfies *Sykes'* prejudice prong only if actual, not possible, prejudice is shown so that there is "*actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, — U.S. —, —, 102 S.Ct. 1584, 1596, 71 L.Ed.2d 816, 832 (1982).

Second, in evaluating a trial court's instructions, we must determine the interpretation a reasonable juror might give the words of the instruction in question. *Sandstrom v. Montana*, 442 U.S. 510, 514, 99 S.Ct. 2450, 2454, 61 L.Ed.2d 39 (1979). The entire charge must be examined as a whole to discern whether the issues and law presented to the jury were adequate. *Davis v. McAllister*, 631 F.2d 1256, 1260 (5th Cir.1980), *cert. denied*, 452 U.S. 907, 101 S.Ct. 3035, 69 L.Ed.2d 409 (1981).

[3] The fundamental issue then is whether Ford has carried his burden in establishing that his jury perceived that in deciding whether to recommend life or death, it was denied the use of any nonstatutory mitigating factors. We think not for the following reasons. *First*, the trial court read the statute as written, setting forth the entire list of statutory mitigating circumstances, which statute omits the word "only." The Supreme Court has recognized the Florida statute does not limit a jury's consideration of mitigating circumstances to those listed in the statute. *Proffitt v. Florida*, 428 U.S. at 250 n. 8, 96 S.Ct. at 2965 n. 8.

Second, the instruction here was different from *Washington v. Watkins*, 655 F.2d 1346 (5th Cir.1981), *cert. denied*, — U.S.

——, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982), where the state trial judge concluded the charge with these words:

> If you unanimously find from the testimony that *one or more of the preceding elements of mitigation* exist[s], then you must consider whether *it* outweighs the aggravating circumstances you previously found and you must return one of the following verdicts . . . .

Id. at 1368 (emphasis added). Here the jury was not confined to two "preceding elements of mitigation," as in *Washington*.

Third, that petitioner was not limited in the introduction of evidence which might be considered mitigating and that the jury arguments encompassed all evidence introduced in the case explains counsel's perception that the jury was not denied the use of any evidence in weighing sentences. Thus had petitioner known of *Lockett*, he would still have no reason to object because the jury was not in fact being limited to what it could consider.

Fourth, the sentencing judge's order stated: "There are no mitigating circumstances existing—either statutory or otherwise—which outweigh any aggravating circumstances." This order reflects the trial judge's perception that there was no restriction against the use of *any* nonstatutory mitigating evidence offered by Ford. It is reasonable to conclude that the state judge's perception of what could be considered was conveyed to the jury.

Under these circumstances, a rational conclusion is that the jury did not perceive a restriction on the use of any mitigating evidence.

[4] As an alternative ground we have no problem in concurring with Chief Judge Godbold's assessment of lack of prejudice. The nonstatutory mitigating evidence consisted of testimony by Ford's mother and girlfriend about his family life, education, and work history and testimony by a psychiatrist portraying him as a bright young man frustrated by dyslexia. We agree with Chief Judge Godbold that failure to consider this testimony would not create a substantial likelihood that there was actual and substantial disadvantage to the defendant.

III.

Failure to Require Resentencing When Evidence Insufficient on Some Aggravating Circumstances

After receiving instructions on all eight aggravating circumstances provided in Fla. Stat. § 921.141, Ford's jury recommended the death penalty. The jury gave a general verdict without an indication as to what factors it thought were supported by the evidence or controlling in its deliberations. The state trial judge then recited evidentiary support for all eight statutory aggravating circumstances and sentenced petitioner to death. On direct appeal the Florida Supreme Court ruled three of the eight did not apply because two lacked evidentiary support and one was based on the same aspect of the crime as another circumstance. *Ford v. State*, 374 So.2d at 501–03. Upholding the other five aggravating circumstances, the Supreme Court specifically found the killing "especially heinous, atrocious, or cruel." *Id.* at 503. In the absence of any mitigating circumstances, death was presumed the appropriate penalty and the sentence was affirmed. *Id.*

Petitioner argues that resentencing under the above circumstances is required under *Henry v. Wainwright*, 661 F.2d 56 (5th Cir. 1981), *vacated and remanded on other grounds*, —— U.S. ——, 102 S.Ct. 2922, 73 L.Ed.2d 1326, *judgment reinstated*, 686 F.2d 311 (5th Cir.1982), and *Stephens v. Zant*, 631 F.2d 397 (5th Cir.1980), *reh. denied and modified*, 648 F.2d 446 (5th Cir.1981), *certified to the Supreme Court of Georgia*, —— U.S. ——, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982).

In *Stephens* the Georgia Supreme Court had ruled that one of the statutory aggravating circumstances presented to the jury was unconstitutionally vague. We held that the death sentence must be set aside because it was impossible to tell from the record the extent to which the Georgia jury had relied on an *unconstitutional* statutory aggravating factor in imposing the death

penalty. *Stephens v. Zant*, 631 F.2d at 406. The United States Supreme Court has now certified to the Georgia Supreme Court the question of what state law premises support the conclusion that the death sentence should stand in the face of the jury's finding an invalid statutory aggravating circumstance. *Zant v. Stephens*, — U.S. —, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982). The Supreme Court thus indicated that the state law rationale of a rule like Florida's, under which a death penalty can be upheld even in the face of some difficulty with the precise grounds relied on by the sentencer, is important to the constitutional decision. In *Henry*, which was adhered to by the panel, 686 F.2d 311 (5th Cir.1982), after vacation and remand by the United States Supreme Court to consider a state procedural default, — U.S. —, 102 S.Ct. 2922, 73 L.Ed.2d 1326 (1982), we held the trial court committed constitutional error in admitting into evidence and permitting the jury to consider evidence of *nonstatutory* aggravating circumstances. *Henry v. Wainwright*, 661 F.2d at 60.

While the precise impact of the Supreme Court's recent actions in *Stephens* cannot be known at this juncture, the Court's ruling gives no direct support to Ford's position in this case. Indeed, *Stephens* leaves open the possibility that when there are proper state law premises, a death sentence may be sustained by a reviewing court so long as at least one of a plurality of statutory aggravating circumstances is valid and supported by the evidence. *Williams v. Maggio*, 679 F.2d 381, 386-90 (5th Cir.1982) (en banc) (upholding death sentence where Louisiana Supreme Court reviewed only one of three aggravating circumstances).[5]

In any event, we think that *Stephens* and *Henry* are inapposite to the case at bar. This case involves consideration of neither unconstitutional nor nonstatutory aggravating evidence. That the evidence was insufficient to support two circumstances and one circumstance was based on the same aspect of the crime as another does not suggest that the sentencing court considered any extraneous or improper evidence. The sentencing jury and judge considered only evidence of factors which could properly be considered by them. This case is appreciably different from *Stephens* because there the jury may have considered evidence that it could not constitutionally consider. In this case, no evidence considered was inappropriate for consideration. The sentencing judge's erroneous classification of that evidence as the aggravating circumstances permitted by statute should not constitutionally infect the sentence. On all of the evidence before him, he reached the determination that the death sentence was appropriate.

The state law premise was clearly set forth by the Florida Supreme Court in the opinion on the direct appeal, after it found that the killing was "especially heinous, atrocious, or cruel."

> Consequently, even though there was error in assessment of some of the statutory aggravating factors, there being no mitigating factors present death is presumed to be the appropriate penalty. *Elledge v. State*, 346 So.2d 998 (Fla.1977); *State v. Dixon*, *supra*.

Ford v. State, 374 So.2d at 503. In *Elledge* the Florida Supreme Court set out its rationale for the rule. The court reasoned that in the absence of mitigating circumstances "so long as there are *some* statutory aggravating circumstances, there is no danger that nonstatutory circumstances have served to overcome the mitigating circumstances in the weighing process which is indicated by our statute." *Elledge v. State*, 346 So.2d at 1003 (emphasis in original). Consistent with its interpretation of the sentencer's role as "a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present," *id.* at 1003, (quoting *Dixon v. State*, 283 So.2d 1, 10

5. We note that this case is not binding precedent for the Eleventh Circuit since it is a decision by Unit A of the Former Fifth Circuit made after October 1, 1981. *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33, 34 (11th Cir.1982).

(Fla.1973)), the court questioned whether the weighing process would have been different had the impermissible aggravating factor not been present. 346 So.2d at 1003. In *Elledge* the court declined to uphold the sentence because the sentencing judge had considered the impermissible aggravating circumstances and had found some mitigating circumstances. *Id.*

In *Ford*, however, no mitigating circumstances were found, and five of the statutory aggravating circumstances relied on by the sentencing judge were upheld. The court logically presumed the weighing process would have reached the same outcome even had the sentencing court not added to the scales those aggravating circumstances found impermissible. *Ford v. State*, 374 So.2d at 503. The Florida Supreme Court's review has achieved the goals of rationality, consistency and fairness enunciated in *Proffitt v. Florida*, 428 U.S. at 258–60, 96 S.Ct. at 2969–70, 49 L.Ed.2d at 926–27, and *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

Nor did the trial court commit constitutional error in instructing the jury as to all aggravating and mitigating circumstances permitted by the statute. To ensure that the jury understands the structure of the law as required by *Proffitt*, it seems appropriate that they be charged fully on the Florida statute and provided proper instructions on the burden of proof and the standard of evidence required to prove the factors given, as they were here.

[5] In setting out the state law premise for the presumption that Ford's death sentence should be affirmed due to the existence of five statutory aggravating circumstances and no mitigating circumstances, we noted that the Florida Supreme Court considered whether the sentence would have been different had the sentencing judge found only the five aggravating circumstances upheld on appeal. The effect of such an evaluation seems very like the application of a harmless error rule. Therefore, we adopt Chief Judge Godbold's opinion as an alternative ground insofar as it is consistent with the reasoning set forth above.

IV.

Admission of Ford's Oral Confession

Ford was arrested in Gainesville, Florida on the day of the murder. He refused to talk with Gainesville police officers, indicating he first wanted to consult a lawyer. He was given an opportunity to talk to a public defender but refused to accept that representation. He was unable to reach his private attorney.

Fort Lauderdale police officers came to return Ford to Fort Lauderdale. The *Miranda* warnings were given and petitioner "wanted" to talk but would not give a written statement until he had contacted his lawyer. Petitioner's only statement at the time was "I didn't shoot that cop." On a small plane from Gainesville to Fort Lauderdale, another officer gave Ford *Miranda* warnings. Ford said he was willing to talk but would give no written statement until he had talked with his lawyer. After informing a Fort Lauderdale officer of his earlier unsuccessful effort to contact his attorney and his refusal of representation by the public defender, petitioner admitted participating in the Red Lobster robbery. Although denying participation in the killing, he admitted being left behind at the Red Lobster by his accomplices, seeing a police officer lying on the ground as he left the restaurant, and escaping in the police car which he abandoned for a green Volkswagen.

Ford claims admission of the above statement in his trial violated the Fifth, Sixth and Fourteenth Amendments and was contrary to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and its progeny, including *United States v. Priest*, 409 F.2d 491 (5th Cir.1969), and *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). He argues that having invoked without waiving his right to counsel, his responses to subsequent police-initiated custodial interrogation without an attorney should not have been admitted into evidence. Additionally, petitioner contends

he received ineffective assistance of counsel in that he did not present the confession issue as a *Miranda* violation in the trial court and failed to raise it on appeal.

Petitioner moved to suppress his confession but failed to appeal the trial court's denial of his motion on direct appeal to the Florida Supreme Court. Based on *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), the federal district court held Ford's failure to raise the issue on direct state appeal foreclosed its consideration in this habeas corpus proceeding.

A. *Ineffective Assistance of Counsel*

[6, 7] First we examine briefly petitioner's claim of ineffective assistance of counsel. Petitioner's attorney attempted to win the suppression of Ford's statement, and on the totality of circumstances in the entire record, rendered reasonably effective assistance in so doing. *Washington v. Watkins*, 655 F.2d at 1355. As the Supreme Court of Florida recognized in discussing this same claim, the statement admitted only presence and participation in the robbery; it denied participation in the shooting. "There was abundant evidence, apart from the confession, some by eye witnesses, to place him at the scene as a participant. Even disregarding petitioner's confession there was overwhelming evidence of guilt." *Ford v. State*, 407 So.2d at 909. In this circumstance, Ford was in no way prejudiced by any action or inaction of his attorney, even if his representation had fallen short of the dictates of the Sixth and Fourteenth Amendments. *Washington v. Watkins*, 655 F.2d at 1362–63.

B. *Wainwright v. Sykes*

[8] With regard to Ford's procedural default, the Florida law is clear. A criminal defendant's failure to raise an issue which could be asserted on direct appeal precludes consideration of the issue on a motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850. *Hargrave v. State*, 396 So.2d 1127 (Fla.1981). Accordingly, the state courts refused to consider Ford's contention in the collateral proceeding concerning the confession.

In *Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963), the Supreme Court held a state prisoner who knowingly and deliberately bypasses state procedures intentionally relinquishes known rights and can be denied habeas corpus relief on that basis. Recognizing *Fay* left open the possibility of "sandbagging" by defense lawyers, the Supreme Court narrowed its sweeping rule in *Wainwright v. Sykes*, 433 U.S. 72, 89, 97 S.Ct. 2497, 2507, 53 L.Ed.2d 594 (1977). The Court held that absent a showing of both cause for noncompliance and actual prejudice, habeas corpus relief is barred where a state prisoner has failed to comply with a state contemporaneous objection rule. 433 U.S. at 87, 97 S.Ct. at 2506.

While *Sykes* arose in the context of a procedural default at the trial level, we have applied its rationale in cases involving a procedural default during the course of a direct appeal from a state court conviction. *See Huffman v. Wainwright*, 651 F.2d 347 (5th Cir.1981); *Evans v. Maggio*, 557 F.2d 430, 433–34 (5th Cir.1977). Other circuits have applied *Sykes* in the same fashion. *See Forman v. Smith*, 633 F.2d 634, 640 (2d Cir.1980), *cert. denied*, 450 U.S. 1001, 101 S.Ct. 1710, 68 L.Ed.2d 204 (1981); *Cole v. Stevenson*, 620 F.2d 1055 (4th Cir.), *cert. denied*, 449 U.S. 1004, 101 S.Ct. 545, 66 L.Ed.2d 301 (1980); *Gibson v. Spalding*, 665 F.2d 863, 866 (9th Cir.1981), *vacated and remanded*, —— U.S. ——, 102 S.Ct. 2229, 72 L.Ed.2d 842 (1982). Applying *Sykes* in this setting accrues the dual advantage of discouraging defense attorneys from omitting arguments in preparing appeals with the intent of saving issues for federal habeas corpus consideration and encouraging state appellate courts to enforce procedural rules strictly, thereby reducing the possibility the federal court will decide the constitutional issue without the benefit of the state's views. *Gibson v. Spalding*, 665 F.2d at 866; *Wainwright v. Sykes*, 433 U.S. at 90, 97 S.Ct. at 2508. Additionally, application of *Sykes* to the forfeiture of specific claims on appeal promotes the goals of comity and accuracy identified by the *Sykes* Court. *Forman v. Smith*, 633 F.2d at 639.

[9] Thus, in this Circuit a state prisoner can forego the opportunity to raise constitutional issues in habeas corpus proceedings by deliberately bypassing state appellate procedural rules or by merely failing to follow them without showing both cause for the default and prejudice resulting from it. Because this record does not reveal Ford's procedural default was the result of an intentional bypass within the meaning of *Fay*, we turn to the cause and prejudice exception of *Sykes*.

[10] Cause and prejudice are sometimes interrelated, *Huffman v. Wainwright*, 651 F.2d at 351. While the Supreme Court has not explicitly defined cause and prejudice, our precedents have defined "cause" sufficient to excuse a procedural default in light of the determination to avoid "a miscarriage of justice." *Id.* Prejudice means "actual prejudice" which in this case must result from the failure to appeal the trial court's admission of petitioner's statement. *See Francis v. Henderson*, 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976); *Buckelew v. United States*, 575 F.2d 515, 519 (5th Cir.1978).

[11] A careful review of the record reveals the *Sykes* exception does not apply in this case. Ford's argument that the procedural default is excused because of the position of Florida courts at the time on the issue must fail. The claim was perceived and asserted in the trial court and therefore could have been asserted on appeal. *Engle v. Isaac*, — U.S. —, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982).

> If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim. Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid. Allowing criminal defendants to deprive the state courts of this opportunity would contradict the principles supporting *Sykes*.

— U.S. at —, 102 S.Ct. at 1572, 71 L.Ed.2d at 802 (footnotes omitted).

Even addressed in terms of manifest injustice, *see Huffman v. Wainwright*, 651 F.2d 347 (5th Cir.1981), under the circumstances of this case, imposition of the *Sykes* forfeiture rule does not constitute a miscarriage of justice. Petitioner does not contest the accuracy of the statement made to the Fort Lauderdale police and, as noted in the discussion of petitioner's ineffective assistance of counsel claim, he was not prejudiced by admission of the statement.

V.

Standard by Which Aggravating Circumstances Must Outweigh Mitigating Factors

Florida Statute § 921.141(3)(b) requires the sentencing court, in imposing the death penalty, to state in writing its finding "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Petitioner contends that because the statute, case law and jury instructions do not require the state to prove that aggravating factors outweigh mitigating factors "beyond a reasonable doubt," Florida's death penalty statute, on its face and as applied in this case, denies convicted capital defendants due process. Ford argues that the crime of capital murder in Florida includes the element of mitigating circumstances not outweighing aggravating circumstances and that the capital sentencing proceeding in Florida involves new findings of fact significantly affecting punishment. Since the element is part of the crime, he asserts that the beyond a reasonable doubt standard is required by *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), and its progeny. Similarly, Ford presents his "subsidiary argument," which he claims the panel failed to consider, that the sentence should be reversed because neither the jury instructions nor the Florida statute require proof of the *existence* of aggravating circumstances beyond a reasonable doubt. We reject these arguments for several reasons.

[12] First, that the aggravating factors must outweigh the mitigating factors for

imposition of the death penalty under the Florida Statute is not an element of the crime of capital murder in Florida. Under the Florida bifurcated death penalty statute, the sentencing proceeding is entirely separate from trial on the capital offense. Indeed, in certain circumstances the state judge can summon different jurors for the latter phase. Fla.Stat. § 921.141(1). Guilt of the capital offense having already been decided, the sentencing jury's sole function is to render an advisory sentence aiding the state judge in determining whether the defendant should be sentenced to death or life imprisonment. *Id.* Thus, that the Due Process Clause "protects the *accused* against *conviction* except upon proof beyond a reasonable doubt of every *fact necessary to constitute the crime* with which he is *charged*," *In re Winship*, 397 U.S. at 364, 90 S.Ct. at 1072 (emphasis added), is irrelevant to deciding under the Florida statute whether there are insufficient mitigating circumstances. The aggravating and mitigating circumstances are not facts or elements of the crime. Rather, they channel and restrict the sentencer's discretion in a structured way after guilt has been fixed. As the Supreme Court explained:

> While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of *Furman* are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.

Proffitt v. Florida, 428 U.S. at 258, 96 S.Ct. at 2969, 49 L.Ed.2d at 926.

Second, the United States Supreme Court has declared constitutional on its face Florida's capital sentencing procedure, including its weighing of aggravating and mitigating circumstances. The Supreme Court stated:

> The directions given to judge and jury by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones. As a result, the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed.

Id. 428 U.S. at 258, 96 S.Ct. at 2969. The statute, facially constitutional, was strictly followed according to its terms.

[13] Third, Ford's argument under *In re Winship* seriously confuses proof of facts and the weighing of facts in sentencing. While the existence of an aggravating or mitigating circumstance is a fact susceptible to proof under a reasonable doubt or preponderance standard, *see State v. Dixon*, 283 So.2d 1, 9 (Fla.1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1951, 40 L.Ed.2d 295 (1974), and *State v. Johnson*, 298 N.C. 47, 257 S.E.2d 597, 617-18 (1979), the relative *weight* is not. The process of weighing circumstances is a matter for judge and jury, and, unlike facts, is not susceptible to *proof* by either party. Petitioner's contrary suggestion is based on a misunderstanding of the weighing process, the statute and the guiding and channeling function identified in *Proffitt v. Florida*, 428 U.S. at 258, 96 S.Ct. at 2969. Indeed, it appears no case has applied *In re Winship* in the manner Ford urges. The North Carolina and Utah cases cited by him which imposed a reasonable doubt standard in this situation turned on construction of state statutes rather than the due process rationale of *In re Winship*. *See State v. Johnson*, 298 N.C. at 74, 257 S.E.2d at 617; *State v. Woods*, 648 P.2d 71 (1981).

Ford's alternate argument, raised for the first time in his reply brief, is that the Florida capital sentencing proceeding involves new findings of fact significantly affecting punishment to which the full panoply of due process rights should be extended, including the requirement that the state prove beyond a reasonable doubt that aggravating factors outweigh mitigating factors. Again petitioner confuses proof of *facts* with the weighing process undertaken by the sentencing jury and judge. Because

the latter process is not a fact susceptible of proof under any standard, we reject this contention.

[14, 15] Finally, Ford contends his death sentence is unconstitutional for failure to require proof of the existence of aggravating circumstances beyond a reasonable doubt. Because this claim was never specifically briefed or raised before the panel, it is not now properly before this Court *en banc*. The requirement that the existence of aggravating circumstances be proved beyond a reasonable doubt is, however, a settled principle of Florida law. *See Jent v. State*, 408 So.2d 1024, 1032 (Fla.1981); *State v. Dixon*, 283 So.2d at 9. We note that in this case, as in nearly all cases, there is no dispute as to the facts on which the existence of the aggravating circumstances is based.

VI.

Florida Supreme Court's Standard of Review

Ford claims the Florida Supreme Court, in reviewing the evidence of aggravating and mitigating circumstances, violated the Eighth Amendment by failing to apply in his case the same standard of review applied in other capital cases. Specifically, he contends that under Florida case law, the court should have set aside two aggravating circumstances, collapsed two aggravating circumstances into one, and found the existence of one statutory mitigating circumstance and of nonstatutory mitigating circumstances.

[16] While petitioner characterizes this contention as the Florida Supreme Court's failure to apply a consistent standard of review in violation of *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), the district court correctly discerned that he is simply "quarreling" with the state court. Where in a capital punishment case the state courts have acted through a properly drawn statute with appropriate standards to guide discretion, *Proffitt v. Florida*, 428 U.S. at 258–59, 96 S.Ct. at 2969, federal courts will not undertake a case-by-case comparison of the facts in a given case with the decisions of the state supreme court. *Spinkellink v. Wainwright*, 578 F.2d 582, 604–05 (5th Cir.1978), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979). This rule stands even though were we to retry the aggravating and mitigating circumstances in these cases, "we may at times reach results different from those reached in the Florida state courts." *Id.* at 605.

[17] The Supreme Court of Florida is the ultimate authority on Florida law and we do not sit to question its interpretation of that State's statutes. *See Tennon v. Ricketts*, 574 F.2d 1243, 1245 (5th Cir.1978), *cert. denied*, 439 U.S. 1091, 99 S.Ct. 874, 59 L.Ed.2d 57 (1979). Ford has not cited and we have not found any habeas corpus decision in which this Court has reversed a death sentence due to the state court's incorrect decision as to the existence or absence of aggravating and mitigating circumstances.

[18, 19] Moreover, examination of the relevant Florida Supreme Court decisions reveals that its review of petitioner's death sentence was not arbitrary, capricious or in disaccord with constitutional principles relating to sentencing in capital cases. The Florida Supreme Court reviewed the circumstances of Ford's case consistently with its principles governing the aggravating and mitigating circumstances at issue in this case, and no deficiency under *Godfrey* is stated. Under 28 U.S.C.A. § 2254(d), we presume correct the facts properly found by the state courts. *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981), *after remand*, — U.S. —, 102 S.Ct. 1303, 71 L.Ed.2d 480 (1982). There is nothing in this record to show the Florida Supreme Court failed to apply the standard of review mandated by *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), and its progeny.

VII.

Assistance of Counsel at Sentencing

Petitioner contends he received ineffective assistance of counsel at sentencing.

Specifically, he claims that although counsel called character witnesses and a psychiatrist to testify in mitigation, he "failed to focus the trial judge's and jury's attention on the critical factors relevant to the sentence determination." Careful review of the record and Ford's specific arguments reveals this contention is nothing more than an attack on the reasoned tactics and strategy of experienced trial counsel.

[20, 21] In reviewing ineffective assistance of counsel claims, we do not sit to second guess considered professional judgments with the benefit of 20/20 hindsight. *Washington v. Watkins*, 655 F.2d at 1355; *Easter v. Estelle*, 609 F.2d 756 (5th Cir. 1980). We have consistently held that counsel will not be regarded constitutionally deficient merely because of tactical decisions. *See United States v. Guerra*, 628 F.2d 410 (5th Cir.1980), *cert. denied*, 450 U.S. 934, 101 S.Ct. 1398, 67 L.Ed.2d 369 (1981); *Buckelew v. United States*, 575 F.2d 515 (5th Cir.1978); *United States v. Beasley*, 479 F.2d 1124, 1129 (5th Cir.), *cert. denied*, 414 U.S. 924, 94 S.Ct. 252, 38 L.Ed.2d 158 (1973); *Williams v. Beto*, 354 F.2d 698 (5th Cir.1965). Even where an attorney's strategy may appear wrong in retrospect, a finding of constitutionally ineffective representation is not automatically mandated. *Baty v. Balkcom*, 661 F.2d 391, 395 n. 8 (5th Cir.1981), *cert. denied*, ––– U.S. ––––, 102 S.Ct. 2307, 73 L.Ed.2d 1308 (1982); *Baldwin v. Blackburn*, 653 F.2d 942, 946 (5th Cir.1981).

[22, 23] That counsel for a criminal defendant has not pursued every conceivable line of inquiry in a case does not constitute ineffective assistance of counsel. *Lovett v. Florida*, 627 F.2d 706, 708 (5th Cir.1980). This is not a case in which counsel allegedly failed to prepare and investigate adequately. Ford's counsel was reasonably likely to render and did render reasonably effective assistance. *See Herring v. Estelle*, 491 F.2d 125, 127 (5th Cir.1974). Because the record reveals Ford received constitutionally adequate representation and no prejudice resulted to him by any action or inaction of counsel, *see Washington v. Watkins*, 655 F.2d at 1362, Ford has not carried his burden of proving ineffective assistance of counsel. *See United States v. Killian*, 639 F.2d 206, 210 (5th Cir.), *cert. denied*, 451 U.S. 1021, 101 S.Ct. 3014, 69 L.Ed.2d 394 (1981).

The judgment denying habeas corpus relief is AFFIRMED, but the case is REMANDED to the district court for further proceedings as set forth in the per curiam opinion of the Court.

GODBOLD, Chief Judge, joined by CLARK, Circuit Judge, except as to the concurrence in Part V of the majority opinion, dissenting in part and specially concurring in part:

[6–23] I concur in Parts IV, V, VI and VII of the majority's opinion. I write to indicate my separate views on the remaining issues.[1]

I.

I dissent from the majority's holding and treatment of the *Brown* issue, Part I of its opinion. The rationale, if not the narrow holding, of *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) (plurality decision), prohibits an appellate court from relying on, that is, using as a factor in its decision, nonrecord information.[2]

1. I generally agree, however, with the reservations about Part V that are expressed in footnote 2 of Judge Kravitch's dissent.

2. In *Gardner*, the court decided that a trial judge may not to any extent impose a death sentence on the basis of nonrecord information. While *Gardner* failed to produce a majority opinion, a coherent rationale emerges from the case. The rationale, based either on the due process clause, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (plurality opinion), or the Eighth Amendment, 430 U.S. at 362, 97 S.Ct. at 1206 (White, J., concurring), holds that in death cases there is a heightened need for reliable factual determinations. *See also Eddings v. Oklahoma*, 455 U.S. 104, 117, 102 S.Ct. 869, 877, 71 L.Ed.2d 1, 12 (1982) (O'Connor, J., concurring); *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d

In concluding that the Florida Supreme Court did not violate the assumed applicability of *Gardner* the majority understands the Florida Supreme Court to state that it did not rely on nonrecord material.[3] I read the *Brown* opinion differently. It seems to me that the Florida Supreme Court, adopting the subjunctive mode in its opinion, has not directly stated that it did not actually rely on nonrecord information:

> A remaining question is whether the reading of non-record documents *would* so affect members of this Court that they *could* not properly perform their assigned functions. Plainly, it *would* not.

Brown v. Wainwright, 392 So.2d 1327, 1333 (Fla.1981) (emphasis added). Of course, the extrinsic material should not be used and would not be used by the court in the proper performance of its review function. But this definition of correct function simply begs the question whether in this particular set of circumstances, accidentally or otherwise, the extrinsic material actually was relied upon. I cannot find in the Florida Supreme Court's opinion what the majority, see n. 3, *supra*, describe as "the statement that it [extrinsic material] was not used." The disparate views that the judges of this court have expressed about the import of *Brown* convincingly demonstrate the intractable ambiguity of the Florida Supreme Court's opinion. The majority read the Florida Supreme Court to state in *Brown* that it did not use extrinsic material, but Judge Johnson reads *Brown* to say that the Florida Supreme Court actually did consider such material (Judge Johnson's dissent at 872: "It is clear, therefore, from the *Brown* opinion that the Florida Supreme Court has considered nonrecord material"), and Judge Kravitch's opinion maintains that *Brown* raises a presumption that the Florida Supreme Court used nonrecord material (Judge Kravitch's dissent at 853).

The Florida Supreme Court, I believe, should address and squarely rule on whether it relied on nonrecord material in reviewing Ford's sentence. I would accept, without further inquiry, a direct statement by the Florida Court that it did not rely.[4] Of course, if the Florida Supreme Court did rely on nonrecord information, *Gardner* was violated and the defendant must have a fresh appellate review of his sentence.

II.

While I concur in the majority's ultimate conclusion that the jury instructions regarding mitigating circumstances do not require

944, 961 (1976) (opinion of Stewart, Powell & Stevens, JJ.) ("there is a [special] . . . need for reliability in the determination that death is the appropriate punishment"). Because "debate between adversaries is often essential to the truthseeking function", 430 U.S. at 360, 97 S.Ct. at 1205 (plurality opinion), reliance on nonrecord information creates an unacceptable danger that death will be wrongly imposed. 430 U.S. at 359-62, 97 S.Ct. at 1205-1206 (plurality opinion); 430 U.S. at 364, 97 S.Ct. at 1207 (White, J., concurring).

The Florida Supreme Court held that *Gardner* does not apply to an appellate court because an appellate court does not "impose" a death sentence. *Brown v. Wainwright*, 392 So.2d 1327, 1332-33 (Fla.1981). Majority op. at 810 n. 2. The distinction between "imposition" and "review" of a death sentence ignores both *Gardner's* rationale and the integral role that the Supreme Court has envisaged for appellate review in death cases. *See Gregg v. Georgia*, 428 U.S. 153, 198, 205-06, 96 S.Ct. 2909, 2936, 2940, 49 L.Ed.2d 859 (1976) (opinion of Stewart, Powell & Stevens, JJ.); *Id.* at 207, 223-24, 96 S.Ct. at 2941, 2948 (White & Rehnquist, JJ., & Burger, C.J., concurring).

3. But even if members of the court solicited the material with the thought it should, would or might be used in the review of capital sentences, the decision of the Florida court that it should not be so used, *the statement that it was not used*, and the rejection of the notion that it affected the judgment of the reviewing judges of the court ends the matter when addressed at the constitutional level.
Majority op. at 811 (emphasis added).

4. Appellate courts routinely accept a trial judge's assurances that, although he has seen evidence, he has not relied upon it. The most common situation occurs where, in a bench trial, a judge examines evidence and then rules it inadmissible. *See Harris v. Rivera*, 454 U.S. 339, 346, 102 S.Ct. 460, 465, 70 L.Ed.2d 530, 536 (1981) ("in bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions"). Judge Tjoflat develops this point more fully at p. 833 of his separate opinion.

a grant of habeas, I find the majority's reasoning unacceptable.[5]

[4] As the majority correctly notes, we can decide the adequacy of the contested jury instructions only if the defendant demonstrates that he had cause for and was prejudiced by his conceded failure to raise the issue at trial. *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). In the context of jury instructions the Supreme Court has recently decided that prejudice means "not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage." *U.S. v. Frady*, — U.S. —, —, 102 S.Ct. 1584, 1596, 71 L.Ed.2d 816, 832 (1982) (emphasis in original). Even though the jury probably did not consider the proffered evidence of non-statutory mitigating factors, (see Judge Kravitch's dissenting opinion at 835, for a summary of the proffered evidence) that evidence is unpersuasive. Using the *Frady* test, I cannot conclude that there is "a substantial likelihood that the erroneous . . . instructions prejudiced [the defendant's] chances with the jury." — U.S. at —, 102 S.Ct. at 1597–1598, 71 L.Ed.2d at 834.

III

In Part III of its opinion, the majority wrestles with the difficult issue of whether the Florida Supreme Court, after finding that three of the eight aggravating circumstances relied on by the trial judge were improper, must order that the defendant be resentenced. Like the majority, I believe that the constitution does not compel resentencing, but my reasons differ.

As *Zant v. Stephens*, — U.S. —, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982),[6] suggests, we must initially ask what the Florida Supreme Court's actions mean as a matter of state law. I interpret the Florida Supreme Court to apply a harmless error rule in refusing to order resentencing. The presumption, cited by the Florida court here, that death is appropriate where some aggravating and no mitigating circumstances are present cannot constitute a hard and fast rule of law. The Florida Supreme Court permits the trial judge and jury to forego the death sentence in just such circumstances. *See Williams v. State*, 386 So.2d 538, 543 (Fla.1980). The presumption must therefore constitute a harmless error rule that operates only where the initial sentencer has misapplied the sentencing statute. *See Henry v. Wainwright*, 661 F.2d 56, 58 (5th Cir.1981) (Unit B) (State interpreted Florida Supreme Court to apply a harmless error rule where death statute was misapplied below), *vacated on other grounds*, — U.S. —, 102 S.Ct. 2922, 73 L.Ed.2d 1326 (1982).

[5] The Florida Supreme Court's actions, so interpreted, pass constitutional muster in this case. *See Zant v. Stephens*, — U.S. —, —, 102 S.Ct. 1856, 1865, 72 L.Ed.2d 222, 235 (1982) (Powell, J., dissenting) ("I would leave open—also for the Supreme Court of Georgia to decide—whether it has authority to find that the instruction was harmless error beyond a reasonable doubt"); *Drake v. Zant*, 449 U.S. 999, 101 S.Ct. 541, 66 L.Ed.2d 297 (1981)

5. Relying in part on a sentence buried in the trial judge's findings written well after the jury had completed its deliberations, the majority asserts that the jury did not feel bound to consider only those mitigating factors explicitly listed in the Florida statute. Except in the situation where the overall jury charge explains or corrects an erroneous instruction, not applicable here, neither trial judge nor appellate court can "know" that a jury did not consider itself bound by any particular erroneous or misleading instruction.

6. In *Stephens*, the Court was confronted with an issue closely related to the one presently before us. There the jury found three aggravating and no mitigating circumstances and sentenced the defendant to death. The Supreme Court of Georgia held one of the aggravating circumstances invalid under the federal constitution but nevertheless affirmed the sentence. The Supreme Court certified the following question to the Supreme Court of Georgia: "What are the premises of state law that support the conclusion that the death sentence in this case is not impaired by the invalidity of one of the statutory aggravating circumstances found by the jury?" — U.S. at —, 102 S.Ct. at 1859, 72 L.Ed.2d at 227–28.

(White, J., dissenting to denial of cert.) ("Nor do I believe that the Constitution requires the Georgia Supreme Court to vacate the sentences if it fails to sustain the *Godfrey* aggravating circumstance. The cases now before us involve only sentencing, not guilt or innocence, and there is no constitutional right to jury sentencing."). As a matter of general constitutional policy I think it essential that appellate courts be able to employ a harmless error rule where the initial sentencer has found aggravating circumstances to outweigh mitigating circumstances by such a definitive margin. Otherwise the resultant procedural maze can be expected to subvert the judicial process in cases where the death sentence is imposed.

In *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), the Court held that the sentencer must be permitted to consider mitigating evidence relating to "any aspect of a defendant's character or record and any of the circumstances of the offense . . . " 455 U.S. at 110, 102 S.Ct. at 874, 71 L.Ed.2d at 8 (quoting *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (plurality opinion)). At some point the relevance of the defendant's proffered evidence becomes so attenuated that the trial judge will justifiably exclude it. But because it is not clear exactly where the line should be drawn, one can expect that the appellate court will, in many cases, find that the trial judge erred in excluding such evidence. Absent a harmless error rule, the death sentencing process will become so time-consuming and cumbersome that the death sentence will be imposed rarely and freakishly, in violation of *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). I believe that the Supreme Court did not intend such a result.

General policy aside, existing precedent does not justify ordering resentencing here. While the defendant has a constitutional right to be convicted by a jury, *see Street v. New York*, 394 U.S. 576, 585–87, 89 S.Ct. 1354, 1362–1363, 22 L.Ed.2d 572 (1969) (reversal required where jury considered improper legal theory in *convicting* defendant), he has no right to jury sentencing. Thus, use of the harmless error rule in this case violates the constitution only if it runs afoul of the principles established by the Court's death cases.[7] Some have interpreted the requirements that the jury's discretion be channeled by adequate standards and that the sentence be rationally reviewed to imply that the trial judge and jury in every case must properly apply the statutory standards. *See Zant v. Stephens*, *supra* — U.S. at —, 102 S.Ct. at 1859, 72 L.Ed.2d at 228 (Brennan & Marshall, JJ., dissenting); *Westbrook v. Balkcom*, 449 U.S. 909, 101 S.Ct. 541, 66 L.Ed.2d 297 (1981) (Stewart, J., dissenting to denial of cert.); Judge Kravitch's dissenting op. at 840–841; Judge Johnson's dissenting op. at 875–876. I cannot agree. The requirements of adequate standards and rational review do not possess an immutable meaning that judges can immediately discern; they must be interpreted in light of their dual purposes of insuring reliable and consistent application of the death penalty. Use of a harmless error rule here frustrates neither purpose. Greater inconsistency is not a danger because the Florida Supreme Court's affirmance is based on the same discretion channeling standards that the jury and judge would use in resentencing the defendant. Presumably the Florida Supreme Court will apply its harmless error rule with an eye towards consistency. Use of a harmless error rule does not risk greater unreliability because the Florida Supreme Court bases its harmless error decision on the same evidence that the trial judge and jury would use on remand.

7. Use of a harmless error rule might also be unconstitutional where the appellate court affirms a death sentence based on a theory not considered at trial. Due process would seem to require that the defendant have an opportunity to advance legal arguments and introduce evidence on the sentencing theory used. *See Presnell v. Georgia*, 439 U.S. 14, 99 S.Ct. 235, 58 L.Ed.2d 207 (1978). Here the Florida Supreme Court affirmed the sentence based only on factors that were considered by the trial judge and jury.

Henry v. Wainwright, 661 F.2d 56 (5th Cir.1981), *vacated on other grounds*, — U.S. —, 102 S.Ct. 2922, 73 L.Ed.2d 1326 (1982) and *Stephens v. Zant*, 631 F.2d 397 (5th Cir.1980), *reh. denied and modified*, 648 F.2d 446 (5th Cir.1981), *certified to Supreme Court of Georgia*, — U.S. —, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982), do not stand in the way of my conclusion that resentencing is not constitutionally required here. In both of those cases the standards used by the jury were held to violate the federal constitution. Here, in contrast, there is no suggestion that the judge's errors are of constitutional dimensions. I believe that the constitution does not prohibit use of a harmless error rule to correct mere errors of state law.

TJOFLAT, Circuit Judge, concurring in part and dissenting in part:

I.

The petitioner presents to this en banc court the following constitutional claims: (1) petitioner's oral confession should not have been admitted into evidence during his state court trial; (2) the state sentencing court improperly limited the advisory jury to considering only statutory mitigating factors in violation of *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (I will refer to this claim as the "*Lockett* claim"); (3) the sentencing court, in instructing the advisory jury and in making its own findings, failed to require that the existence of aggravating circumstances, and the finding that aggravating circumstances outweigh mitigating circumstances, be proved beyond a reasonable doubt; (4) petitioner's counsel was ineffective during the sentencing phase of petitioner's trial; (5) the Florida Supreme Court, in reviewing petitioner's capital sentence on direct appeal from the state trial court, violated the rule of *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), by considering nonrecord material (I will refer to this claim as the "*Brown* claim," see *Brown v. Wainwright*, 392 So.2d 1327 (Fla.), *cert. denied*, 454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981)); (6) the Florida Supreme Court's direct review of petitioner's sentence was inconsistent with its review of other capital sentences; and (7) the Florida Supreme Court impermissibly allowed petitioner's capital sentence to stand on direct appeal despite the sentencing court's reliance on three improper aggravating circumstances (I will refer to this claim as the "*Stephens* claim," see *Zant v. Stephens*, — U.S. —, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982)).

This court should address these claims in the following order: first, those challenging the validity of petitioner's conviction; second, those challenging the validity only of petitioner's sentence; and third, those challenging the validity only of the Florida Supreme Court's review of petitioner's sentence. I adhere to this procedure because if petitioner were to prevail on any claims in the first category, it would be unnecessary for us to address those in the latter two categories, because he would be entitled to a new trial. Similarly, if petitioner were to prevail on any claims in the second category, we would not have to address those in the third category because resentencing would be required.

Thus, petitioner's claim regarding the inadmissibility of his oral confession must be decided first because a holding in his favor would require a new trial on the issue of guilt. Next, if necessary, we must consider those claims that attack the validity of petitioner's sentence: the *Lockett* claim, the burden of proof claims, and the ineffective assistance of counsel claim. Finally, if necessary, we must consider those claims that attack the validity of the Florida Supreme Court's review of petitioner's sentence: the *Brown* claim, the inconsistency claim, and the *Stephens* claim.

[8–11, 16–23] I resolve these claims as follows: (1) There is no disagreement among the members of this court on the issue of the admissibility of petitioner's oral confession; therefore, I adopt the conclusion and the reasoning of the panel opinion, *Ford v. Strickland*, 676 F.2d 434, 437–39 (11th Cir.1982). *Wainwright v. Sykes*, 433

U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), bars this claim; (2) *Sykes* bars petitioner's *Lockett* claim; (3) *Sykes* bars petitioner's claims that the existence of aggravating circumstances, and the finding that aggravating circumstances outweigh mitigating circumstances, must be proved beyond a reasonable doubt; (4) there is no disagreement among the members of this court over the disposition of petitioner's claim that his counsel was ineffective at the sentencing phase of his trial; therefore, I adopt the panel decision that petitioner failed to prove this claim, 676 F.2d at 443;[1] (5) I reach the merits of the *Brown* claim and hold that the Florida Supreme Court committed no constitutional error; (6) there is no disagreement among the members of this court regarding petitioner's proportionality claim; therefore, I adopt the panel opinion rejecting this claim on the merits, *id.* at 442–43;[2] (7) concerning petitioner's claim that the Florida Supreme Court should not have allowed his sentence to stand in light of the sentencing court's reliance on three improper aggravating circumstances, I find this case indistinguishable from *Zant v. Stephens*, — U.S. —, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982), and, therefore, I find it necessary to invoke the Florida certification procedure to obtain a clarification of Florida law.

I make no further mention of claims 1, 4, and 6 above because the panel decided them correctly. In order to decide the remaining claims, it is necessary to examine the procedural history of this case, particularly the stages at which petitioner raised his claims.

II.

Petitioner was convicted in the Circuit Court for Broward County, Florida, of first-degree murder. At the sentencing phase of petitioner's trial, the jury recommended the death penalty.[3] The trial judge found eight aggravating circumstances and no mitigat-

1. Furthermore, I note that petitioner does not contend that he received an improper hearing either before the state circuit court on his motion for post-conviction relief or before the federal district court, on his claim of ineffective assistance of counsel. On the contrary, the state circuit court conducted an exhaustive hearing on this claim. The federal district court would have been well within its discretion merely to adopt the findings of the state court and deny petitioner the opportunity to present further evidence. In an abundance of caution, the federal district court did entertain such evidence. Petitioner asserts no reason for this court to question the findings and conclusions of the federal district court or of the state circuit court, both of which were able to judge the credibility of the witnesses who testified for petitioner regarding his claim of ineffective assistance of counsel.

2. I note that petitioner never presented his proportionality claim to the state courts and therefore never exhausted it. Because the state has not raised the exhaustion issue, however, it has waived it. *Lamb v. Jernigan*, 683 F.2d 1332, 1335 n. 1 (11th Cir.1982). See note 23 *infra*.

3. The Florida death penalty statute in force at the time of petitioner's offense and sentence provided:

> 921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—
>
> (1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections [5] and [6]. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.
>
> (2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the

ing circumstances, accepted the jury's recommendation, and sentenced petitioner to death. Petitioner alleges that the sentencing court committed two constitutional violations: first, it impermissibly restricted the jury to considering only statutory mitigating factors in violation of *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); and second, it failed to require that both the existence of aggravating circumstances and the finding that aggravating circumstances outweigh mitigating circumstances be proved beyond a reasonable doubt. Petitioner did not call either of these alleged violations to the attention of the trial court.

jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection [5].

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection [6], which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life [imprisonment] or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection [5], and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection [6], to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections [5] and [6] and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

Fla.Stat. § 921.141 (1975).

On direct appeal, petitioner presented neither alleged constitutional violation to the Florida Supreme Court. Petitioner raised three other claims, none of which are before this court. The Florida Supreme Court affirmed petitioner's conviction and sentence, although it held that the sentencing court relied on three improper aggravating circumstances in imposing the death penalty.[4] *Ford v. State*, 374 So.2d 496 (Fla. 1979). The United States Supreme Court denied certiorari. *Ford v. Florida*, 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980).

Petitioner alleges that the Florida Supreme Court committed two constitutional violations on direct review of his conviction and sentence: first, it impermissibly considered nonrecord material; and second, it impermissibly affirmed petitioner's sentence despite holding that three of the eight aggravating circumstances the sentencing court relied on were invalid. Petitioner brought to the Florida Supreme Court's attention the first of these alleged constitutional errors when he joined with one hundred and twenty-two other persons in filing a petition for a writ of habeas corpus in the Florida Supreme Court. The petitioners challenged the court's alleged practice of considering nonrecord material in reviewing capital sentences. *Brown v. Wainwright*, 392 So.2d 1327 (Fla.), *cert. denied*, 454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981). The Florida Supreme Court denied the writs, holding that no constitutional violation had occurred. *Id.* at 1330–33.

Petitioner next filed a motion in state circuit court for post-conviction relief under Florida Rule of Criminal Procedure 3.850. In support of this motion, petitioner argued for the first time, *inter alia*, the *Lockett* claim, and the burden of proof claims.[5] The circuit court held that petitioner could not raise these claims on collateral attack of his conviction and sentence.

Petitioner appealed the circuit court's denial of his motion for post-conviction relief to the Florida Supreme Court. *Ford v. State*, 407 So.2d 907 (Fla.1981). He sought to have the Florida Supreme Court decide the merits of the *Lockett* claim and the burden of proof claims by also filing a petition for a writ of habeas corpus. *Id.* at 908. In support of this petition, petitioner alleged that his appellate counsel was ineffective in failing to raise these claims before the Florida Supreme Court on direct appeal. He asked the court to grant him belated appellate review of these claims. The court rejected the ineffective assistance of appellate counsel claim,[6] and affirmed the circuit court's determination that petitioner could not raise the *Lockett* claim or the burden of proof claims on a motion for post-conviction relief: "[These claims] were all matters known at the conclusion of the trial which could have been, but were not, raised on direct appeal. Accordingly, collateral attack ... was properly determined by the trial court not to be an appropriate remedy ...." *Id.* Thus, the petitioner's failure to raise these claims either before the circuit court, during the criminal prosecution, or on direct appeal constituted a procedural default.

Next, petitioner filed this application for a writ of habeas corpus in federal district court. Before the district court, the petitioner raised all of the claims that now concern the en banc court: the *Lockett* claim, the burden of proof claims, the *Brown* claim, and the *Stephens* claim. Petitioner raised the first two claims despite his procedural default before the state courts.[7]

4. See note 21 *infra*.

5. In his motion for post-conviction relief before the circuit court, the petitioner also claimed that his trial counsel was ineffective. See note 1 *supra*. Petitioner did not raise the claim that the Florida Supreme Court impermissibly failed to require resentencing despite the invalidity of three out of eight aggravating circumstances, *i.e.*, the *Stephens* claim; he never raised this claim in any state proceeding. See note 23 *infra*.

6. The court also affirmed the circuit court's holding that petitioner did not prove ineffective assistance of his trial counsel.

7. Petitioner raised the *Stephens* claim despite his failure to exhaust his state remedies. See note 23 *infra*.

The district court ruled that because petitioner had made no showing of cause and prejudice to satisfy the standard of *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), he was barred from challenging in federal court on a petition for a writ of habeas corpus the state court's instructions to the jury at the sentencing phase of the trial. Therefore, *Sykes* barred consideration of the *Lockett* claim and the claim that aggravating circumstances must be proved beyond a reasonable doubt. The district court denied on the merits petitioner's claim that aggravating circumstances must outweigh mitigating circumstances beyond a reasonable doubt,[8] his *Brown* claim, and his *Stephens* claim.[9]

The petitioner then appealed to this court. A panel of this court rejected on the merits each of petitioner's claims now under consideration.[10] The panel reached the merits of the *Lockett* claim despite the district court's holding that *Sykes* was dispositive of this claim and despite the state's reliance on *Sykes* in its brief. Answer Brief of Respondents/Appellees at 27-31. The case now comes before this en banc court.

III.

Having recounted the procedural history of the case, I turn to the issues raised by petitioner's claims. Petitioner's first claim is that the following jury instruction violated *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978): "As to aggravating circumstances . . . you shall consider only the following: [the court then recited the statutory factors]. As to mitigating circumstances . . . you shall consider the following [the court then recited the statutory factors]."[11] State Trial Transcript at 1347-49. Petitioner complains that although the court omitted the word "only" in connection with reciting the mitigating factors, the instruction was ambiguous enough that a reasonable juror could have thought he was precluded from considering nonstatutory mitigating factors.

Because petitioner never objected to the above instruction at trial or on direct appeal, the cause and prejudice standard of *Sykes* applies. The question of cause is a factual inquiry on which petitioner has the burden of proof. Petitioner never introduced any evidence, other than the record of the state court prosecution, to prove cause before the district court. Petitioner's belated attempt to argue cause before this court is no substitute for the introduction of evidence at the district court level. Our appellate function is not to determine legal issues in the abstract or to find facts, but to decide whether the trial court erred. Because the trial court was faced with no direct evidence that would explain why petitioner's attorney failed to object to the challenged instruction, it cannot be seriously contended that the trial court erred in holding that *Sykes* bars petitioner's claim.

Petitioner's argument that "reasonably effective counsel" would not have foreseen his *Lockett* claim at the time of his state court trial, Brief for Petitioner-Appellant at 36-37, misses the mark. The relevant ques-

8. The district court did not apply *Sykes* to bar petitioner's claim that aggravating circumstances must outweigh mitigating circumstances beyond a reasonable doubt because petitioner did not raise this claim in district court as an attack on the state court jury instructions. As discussed in Part IV *infra*, the district court erred in failing to apply *Sykes* to this claim.

9. The state did not raise petitioner's failure to exhaust the lattermost claim in state court. See note 23 *infra*.

10. The panel did not reach the merits, however, of the constitutionality of petitioner's oral confession because petitioner had committed a procedural default and because he did not satisfy the *Sykes* cause and prejudice standard.

In addition, before the panel, the petitioner argued only that aggravating circumstances must outweigh mitigating circumstances beyond a reasonable doubt. He did not argue, at least in his initial brief, that aggravating circumstances must be proved beyond a reasonable doubt. The panel opinion does not address the latter claim. Technically, therefore, this claim is not properly before this en banc court.

11. See note 3 *supra*.

tion is not what "reasonably effective counsel" would have foreseen, but whether petitioner's attorney had cause not to object to the challenged instruction. This question cannot be answered in the abstract, but must be based on what counsel actually knew and his reasons for not objecting at trial. The possibility the state raises, Answer Brief of Respondents-Appellees at 29–30, that counsel's choice not to object was based on strategic considerations, cannot be lightly dismissed.

Petitioner admits that he was not precluded from introducing evidence on nonstatutory mitigating factors during the sentencing phase of his trial. Furthermore, petitioner admits that he introduced such evidence.[12] Supplemental Brief for Petitioner-Appellant on Rehearing En Banc at 19 n. 7. The introduction of such evidence, coupled with counsel's request that the jury not be instructed *at all* on aggravating and mitigating factors, State Trial Transcript at 1309, strongly suggests that counsel's strategy was to direct the jury's attention away from the instruction and toward the evidence presented, in order to allow himself the widest possible latitude in arguing his case to the jury. Thus, counsel sought to ensure that the jury would receive the issues as he had framed them, rather than as framed by the court in the form of an instruction.

The court declined counsel's request that the jury not be instructed on such factors. Counsel then asked that the jury not receive a written instruction on such factors, and the court acceded to this request. Thus, counsel was still able to focus the jury's attention on nonstatutory mitigating evidence. Counsel's request that the jury not receive a written instruction reinforces the conclusion that counsel's failure to object to the instruction was a carefully chosen trial stratagem.[13]

Counsel no doubt thought that had he objected to the instruction, his objection would have been overruled, and the court may have then prevented him from introducing evidence on nonstatutory mitigating factors or from arguing them to the jury. Counsel was faced with the choice of foregoing a favorable jury instruction but being allowed to introduce favorable evidence and to exploit such evidence to the fullest extent before the jury, or of attempting to procure a favorable instruction but, by alerting his opponent and the court to the issue, risk an adverse ruling not only on the instruction, but also on the evidence. Counsel chose the first alternative. This is precisely the type of deliberate tactical choice the *Sykes* standard is meant to address.

In conclusion, analysis of the state court trial record demonstrates clearly that petitioner's failure to object was a matter of trial strategy. The petitioner has come forward with no evidence to the contrary. I conclude that, because he has failed to satisfy the "cause" prong of the "cause" and "prejudice" test of *Wainwright v. Sykes*, his *Lockett* claim is barred. I concur, there-

12. My resolution of the cause issue makes it unnecessary for me to decide the question of prejudice. Nevertheless, I note that petitioner's introduction of evidence on nonstatutory mitigating factors, and the trial court's allowance of argument on such evidence, strongly suggests that petitioner could not have been prejudiced by the challenged instruction, which at worst was merely an ambiguous instruction to an advisory jury. The state never even attempted to exploit this ambiguity. Petitioner's claim that this perhaps ambiguous instruction, which enabled his attorney to present his case to the jury in the best light possible, resulted in a "miscarriage of justice," Supplemental Brief for Petitioner-Appellant on Rehearing En Banc at 24 n. 11, borders on the frivolous.

13. Also supporting this conclusion is petitioner's failure ever to ask his trial attorney why he had failed to object to the challenged instruction. At petitioner's state hearing on his motion for post-conviction relief, he called other attorneys to testify about his former counsel's incompetence but he never called his former counsel, who was present at the hearing. At his federal habeas hearing, petitioner did call his state trial counsel, but still avoided questioning him about his failure to object to the *Lockett* instruction. Thus, petitioner's failures at both the state and federal levels to question his former counsel about counsel's reasons for not objecting further support the conclusion that counsel's failure to object was a deliberate trial stratagem.

fore, in the result the majority reaches on this issue.[14]

IV.

Next, petitioner claims that both the existence of aggravating circumstances and the finding that aggravating circumstances outweigh mitigating circumstances must be proved beyond a reasonable doubt. He raises these claims now as an attack on the trial court's failure either to instruct the jury on the proper burden of proof or to apply the proper burden of proof, later, in making its own findings.[15] I hold that *Sykes* bars these claims.

Petitioner failed to raise any of the above attacks at trial or on direct appeal. Aside from that fact, petitioner has been totally inconsistent in raising these claims on state and federal collateral attack of his conviction and sentence. As discussed in Part II *supra*, petitioner raised his attack on the jury instructions on his motion for state post-conviction relief. The Florida Supreme Court barred this attack because of petitioner's failure to raise it on direct appeal. *Ford v. State*, 407 So.2d at 908. The federal district court held that *Sykes* barred this attack. I would affirm this holding.

In federal district court, petitioner attacked for the first time the trial court's failure to apply the proper burden of proof in making its own findings. Clearly, this was a "matter known at the conclusion of the trial," *Ford v. State*, 407 So.2d at 908, and, therefore, it also should have been raised on direct appeal. Petitioner's failure to do so is just as clearly a procedural default as is his failure to contest the jury instructions either at trial or on direct appeal. I believe the district court erred in reaching the merits of this claim.

This court is, therefore, faced with a clear state procedural default on these attacks. In reaching the merits of them, the majority adopts the practice, with which I vehemently disagree, of picking and choosing when to apply the *Sykes* standard.[16] It is totally inconsistent for the majority to bar petitioner's *Lockett* claim on *Sykes* grounds but to reach the merits of petitioner's bur-

14. Because of the importance of applying the proper analysis to determine "cause" under *Sykes*, I must comment on Judge Kravitch's dissenting opinion. We have stated: "One of the major concerns expressed by the Court [in *Sykes*] was to eliminate 'sandbagging' by defense lawyers who consciously chose to raise constitutional claims for the first time in a federal habeas proceeding." *Huffman v. Wainwright*, 651 F.2d 347, 351 (5th Cir.1981) (citation omitted). Judge Kravitch's opinion, however, actually would encourage sandbagging. Judge Kravitch decides that petitioner need not have objected to an instruction that he now challenges, because state law was unfavorable to the merits of his claim and no authoritative, federal pronouncement on the constitutional basis for the challenge existed, at the time of trial. Opinion of Kravitch, Circuit Judge, at 858. This approach would relieve the defense lawyer of any obligation to object to the law the trial court has determined to apply, although such law is unfavorable to his client, and although an objection at trial is *the only way the issue can properly be preserved for appeal to the state appellate courts*. Indeed, Judge Kravitch's approach, by allowing counsel to forego an objection in state court and later to raise it in federal court, would implicitly instruct counsel *not* to object unless the federal constitutional right is already well established. This interpretation of "cause" would render a state's contemporaneous objection rule wholly inapplicable when there was no authoritative constitutional pronouncement from a federal court to tell the lawyer he has a basis for an objection. It also would discard the lawyer's traditional obligation to object when he thinks error detrimental to his client is being committed. Moreover, it would ensure that the state courts would be precluded from interpreting the Federal Constitution because such courts would be confronted only with those constitutional claims on which a federal court has spoken authoritatively. This result would fly in the face not only of *Sykes*, but of every case ever to recognize that in our federal system, it is a basic notion that state judges are obligated to, and do, uphold the Constitution in the same manner as do their federal counterparts.

15. See note 10 *supra*. I note that petitioner could have raised these claims in state court either on state grounds, *State v. Dixon*, 283 So.2d 1, 9 (Fla.1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1951, 40 L.Ed.2d 295 (1974), or on federal grounds. This court is concerned, however, only with petitioner's federal grounds. Whether petitioner's claims are supported by state law is irrelevant to whether the Federal Constitution compels the result for which petitioner contends.

16. The district court's failure to apply *Sykes* to the claim that aggravating circumstances must outweigh mitigating circumstances beyond a reasonable doubt does not excuse the majority's failure to do so.

den of proof claims, without even acknowledging that a *Sykes* problem exists as to the latter claims.

Although I concur with the result the court reaches on this issue, I do not adopt its reasoning.[17]

17. Because of the majority's resolution on the merits of the question whether aggravating circumstances must outweigh mitigating circumstances beyond a reasonable doubt, and in response to the dissent of my brother Anderson, I am compelled to state my own preliminary views on this issue.

I believe Judge Anderson's characterization of the process of weighing aggravating circumstances against mitigating circumstances as a "finding of fact," Opinion of Anderson, Circuit Judge, at 878, is "clearly erroneous." In determining whether aggravating circumstances outweigh mitigating circumstances, the sentencer makes no finding of fact, but rather engages in a normative determination whether the circumstances of the case are such that the death penalty may properly be imposed. By determining that one set of circumstances outweighs the other, the sentencer makes a normative, policy decision. The sentencer in effect determines state sentencing policy by formulating a norm, based on the facts of the case before it, to be followed by other sentencers in similar cases. The sentencer, therefore, acts not as factfinder, but as policymaker.

The Supreme Court has made it clear that such decisions as whether aggravating circumstances outweigh mitigating circumstances are normative determinations that must be consistent with each other. For example, in upholding the constitutionality of the Florida capital punishment scheme, the Court stated:

> Under Florida's capital-sentencing procedures, in sum, trial judges are given specific and detailed guidance to assist them in deciding whether to impose a death penalty or imprisonment for life. Moreover, their decisions are reviewed to ensure that they are consistent with other sentences imposed in similar circumstances. Thus, in Florida, as in Georgia, it is no longer true that there is " 'no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.' "

Proffitt v. Florida, 428 U.S. 242, 253, 96 S.Ct. 2960, 2967, 49 L.Ed.2d 913 (1976) (quoting prior decisions). And in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), the Court stated:

> [O]ne of the most important functions any jury can perform in making such a selection [as whether to impose capital punishment] is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect "the evolving standards of decency that mark the progress of a maturing society."

Id. at 519 n. 15, 88 S.Ct. at 1775-76 n. 15, *quoting Trop v. Dulles*, 356 U.S. 86, 101, 78 S.Ct. 590, 598, 2 L.Ed.2d 630 (1958).

The inquiry does not end, however, with a determination that whether aggravating circumstances outweigh mitigating circumstances is a normative, policy decision rather than a finding of fact. The majority states: "The process of weighing circumstances is a matter for judge and jury, and, unlike facts, is not susceptible to proof by either party." Majority Opinion at 818. The majority seems to believe that this statement ends the inquiry. Although I believe the court's statement that one does not apply a standard of proof to a weighing process is correct, it is possible to apply a standard of confidence to such a process. Therefore, the court does not adequately address my brother Anderson's argument that there is no logical obstacle to requiring the jury to have "a high degree of confidence" in its determination that aggravating circumstances outweigh mitigating circumstances. Opinion of Anderson, Circuit Judge, at 879.

Having determined that one could impose a high standard of conviction on a sentencing, policy decision, the question becomes whether there is any constitutional requirement that this court do so in this case. It is this question which I do not answer because of my disposition of this claim on *Sykes* grounds. Preliminarily, I am inclined to believe that relevant to this inquiry would be the significant due process protections already embedded in the Florida capital punishment scheme, many of which the Supreme Court recognized in holding in *Proffitt*, 428 U.S. at 259, 96 S.Ct. at 2970, that the Florida scheme "passes constitutional muster." These protections include: a separate evidentiary hearing before an advisory jury and the sentencing judge to determine the appropriate sentence, Fla.Stat. § 921.141(1); a recommended sentence by an advisory jury, *id.* § 921.141(2); the requirement that the trial court, in imposing the death sentence, "set forth in writing its findings upon which the sentence . . . is based," including the existence of aggravating and mitigating circumstances and the determination that aggravating circumstances outweigh mitigating circumstances, *id.* § 921.141(3); and independent appellate review to determine that the capital sentence is warranted and is not disproportionate, *id.* § 921.141(4). See note 3 *supra*.

V.

[2] Petitioner's next claim is that the Florida Supreme Court violated his constitutional rights by considering nonrecord material in reviewing his capital sentence.[18] The petitioner argues that such consideration denied him the opportunity to attack the credibility of such materials in an adversarial manner. He bases this argument on *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), which held invalid on due process grounds the imposition of a capital sentence based in part on material that the petitioner had no opportunity to challenge. Because I believe *Brown v. Wainwright*, 392 So.2d 1327 (Fla.), *cert. denied*, 454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981) is dispositive, I concur in the majority's disposition of this claim.

Before addressing petitioner's constitutional claim, this court must first determine whether the Florida Supreme Court *relied* on nonrecord material in affirming petitioner's sentence. The crucial distinction, which I believe is never articulated clearly enough in the majority opinion, is whether the Florida Supreme Court relied on the material or merely read it. If only the latter is true, then I believe this court is faced with no constitutional question. I can fathom no constitutional rule, from *Gardner* or any other authority, that would preclude an appellate court from merely reviewing nonrecord material without relying on such material in the performance of its appellate function. Because the *Brown* opinion makes clear that the court indeed did not rely on nonrecord material in reviewing petitioner's sentence, I find it unnecessary, as does the majority, to address the claimed constitutional violation.

In *Brown*, the Florida Supreme Court considered the contention of one hundred and twenty-two persons, including petitioner in this case, that the court's practice of considering nonrecord information in reviewing capital sentences was unconstitutional. For purposes of addressing the claimed violation, the court assumed that it had engaged in the practice of requesting and receiving nonrecord information and that it had reviewed such information. Nevertheless, the court held: "[O]ur view of the nonrecord information petitioners have identified is totally irrelevant either to our appellate function in capital cases as it bears on the operation of the statute, or to the validity of any individual death sentence." 392 So.2d at 1331.

The court then described its two functions in reviewing capital sentences: "First, we determine if the jury and judge acted with procedural rectitude in applying section 921.141 [the Florida capital punishment statute] and our case law .... The second aspect of our review process is to ensure relative proportionality among death sentences which have been approved statewide.", *Id.* The court then stated: "The record of each proceeding, and precedent, necessarily frame our determinations in sentence review. Our opinions, of course, then expound our analysis. Factors or information outside the record play no part in our sentence review role." *Id.* at 1332. Finally, after discussing *Gardner*,[19] the court stated: "It is evident, once our dual roles in the capital punishment scheme are fully appreciated, that non-record information we may have seen, even though never presented to or considered by the judge, the jury, or counsel, plays no role in capital sentence 'review.'"[20] *Id.* at 1332-33.

18. This material allegedly included "pre-sentence investigations, psychiatric evaluations or contact notes made in the corrections system after conviction, and psychological screening reports made after conviction by corrections personnel." *Brown*, 392 So.2d at 1330 (footnote omitted).

19. I cannot agree with Judge Kravitch that the Florida Supreme Court's discussion of *Gardner* implies that the court believed there was "no state law barrier" to its reliance on nonrecord material. Opinion of Kravitch, Circuit Judge, at 851. This statement ignores all of the language quoted above. Rather, the court clearly held that under state law it did not rely on nonrecord material. I do not believe the court's obligatory reference to *Gardner* alters that holding.

20. I note now that although the Florida Supreme Court explained its sentence review function in *Brown*, this court, to decide petitioner's *Stephens* claim, still needs further cla-

Not only is the foregoing language a clear statement of state law, as the majority recognizes, but it is also a clear statement of the procedure the court used in reviewing petitioner's claim. First, Ford was a party in *Brown*. Second, although the Florida Supreme Court stated that in the future it would deny class status to habeas claims similar to the one before it, *id.* at 1330, the court considered the claims of all petitioners, not just Brown, and, in explicating a rule of law, effectively stated that it did not rely on nonrecord material in reviewing the sentences of any of the petitioners. The court speaks of petitioners in the plural throughout the *Brown* opinion. The Florida Supreme Court has thus made clear that it did not rely on nonrecord material in reviewing petitioner's sentence.

In the face of this clear holding, the petitioner nevertheless argues that the court did rely on such material. The petitioner states: "To conclude that in a judgmental process [of the sort in which the court engages] the intrusion of extra-record psychiatric and psychological assesaments of the petitioner and similar materials, especially when solicited by the court from the Department of Corrections in connection with the appeal, 'play no part in our sentence review role,' [quoting *Brown*] is to misconceive reality." Brief for Petitioner-Appellant at 67–68. Petitioner's argument is that although the members of the Florida Supreme Court may not have consciously relied on nonrecord material in reviewing his sentence, such information could not have been disregarded by the judges in this case. Petitioner argues: "It simply is not part of human nature to ignore what we have asked to see." Supplemental Brief for Petitioner-Appellant on Rehearing En Banc at 13. Although petitioner recognizes that the premise that judges can disregard that which they must disregard is one of the most basic of our system of justice, petitioner still attacks this premise by asking this court to carve out an exception when judges have requested, rather than passively received, nonrecord materials.

My response to this argument is twofold. First, I see no logical basis for distinguishing between the two situations. If one accepts that judges are capable of disregarding nonrecord information, as this court must, such capability logically does not depend on how this information is obtained. Second, assuming that petitioner's distinction is conceptually valid, adoption of such a distinction would be totally unworkable. Considering the frequency with which judges view nonrecord information, countless claims would arise that the judge viewed information that he could not disregard. Under petitioner's analysis, these claims would turn on the factual issue whether the judge requested the information or passively received it. The burden of such a rule on the administration of justice would be staggering. Therefore, petitioner's argument must be rejected.

Although the premise that judges can and do disregard that which they must disregard is a basic and, indeed, an absolute notion in our system of justice, this premise may in some instances be overridden by the equally fundamental notion that "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11 (1954). There are circumstances in which the appearance of impropriety arising from the court's consideration of prejudicial evidence is so great that the judge must step down. The judge steps down not because the judicial system assumes he is incapable of performing but because the appearance of impropriety to society at large is too detrimental to the judicial system.

Petitioner has never made this latter argument, however; rather, he has merely attacked the premise that judges can disregard nonrecord materials. Because petitioner makes no assertion that as a matter of federal constitutional law, members of the Florida Supreme Court should be forced to step down in this situation on the ground of appearance of impropriety, I intimate no view on this claim.

rification of that court's role in reviewing capital sentences. See Part VI *infra*

Based on the preceding analysis, I concur in the result the majority reaches on this claim.

VI.

The final question petitioner presents to this court is the constitutionality of the Florida Supreme Court's decision, on direct appeal, to uphold petitioner's sentence despite holding first, that two of the aggravating circumstances on which the sentencer relied were not supported by the evidence, and second, that two other aggravating circumstances the sentencer found should have been considered as being only one such circumstance. *Ford v. State*, 374 So.2d at 501-03.[21] The court upheld the sentence because there still existed five proper aggravating circumstances and no mitigating circumstances.[22] The court stated: "[E]ven though there was error in assessment of some of the statutory aggravating factors, there being no mitigating factors present death is presumed to be the appropriate penalty." *Id.* at 503. Because I believe *Zant v. Stephens*, — U.S. —, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982), controls the disposition of this claim, I respectfully dissent from Part III of the majority opinion.[23]

21. The court held that the evidence did not support the following circumstances: "[t]he capital felony was committed by a person under sentence of imprisonment," Fla.Stat. § 921.141(5)(a); and "[t]he defendant was previously convicted of another capital felony involving the use or threat of violence to the person," *id.* § 921.141(5)(b). The court held that the following two aggravating circumstances were in fact only one such circumstance: "[t]he capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of . . . any [robbery or certain other enumerated crimes]; *id.* § 921.141(5)(d); and "[t]he capital felony was committed for pecuniary gain," *id.* § 921.141(5)(f).

22. See note 3 *supra*.

23. Initially, I note that petitioner never raised this claim in state court. I assume the state provided this court with all of petitioner's "briefs on appeal," as mandated by 28 U.S.C. § 2254, Federal Habeas Rule 5, including any briefs filed in support of petitioner's motion for rehearing in the Florida Supreme Court. I can discern no *Stephens* claim from any of these materials.

Petitioner could have raised his *Stephens* claim in state court by petitioning the Florida Supreme Court for rehearing, Fla.R.App.P. 9.330, or by filing a petition for a writ of habeas corpus invoking the Florida Supreme Court's original jurisdiction, Fla.R.App.P. 9.100. Had the state opposed petitioner's claim in the district court for want of exhaustion, we would be required to dismiss the claim. *See Rose v. Lundy*, — U.S. —, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982). Under *Lamb v. Jernigan*, 683 F.2d 1332, 1335 n. 1 (11th Cir.1982), the state waives the exhaustion requirement by failing to raise it, which is what occurred here. Therefore, under *Lamb* this court should consider petitioner's *Stephens* claim.

Moreover, the *Stephens* case itself implicitly compels this court to reach the merits of petitioner's claim despite petitioner's failure to exhaust. As discussed in the text, *Stephens* controls this case because it presented the same issue to the Supreme Court that now faces this court. In *Stephens*, Stephens attempted to exhaust his state remedies by filing a petition for writ of habeas corpus in the Georgia Supreme Court. *Stephens v. Hopper*, 241 Ga. 596, 247 S.E.2d 92, *cert. denied*, 439 U.S. 991, 99 S.Ct. 593, 58 L.Ed.2d 667 (1978). In that petition, Stephens' complaint was that that court's affirmance of his sentence despite the invalidity of one aggravating circumstance was impermissible "because presenting evidence to the jury to support that invalid aggravating circumstance was prejudicial error." 241 Ga. at 603, 247 S.E.2d at 97. Stephens did not argue, however, that the Georgia Supreme Court's earlier action in affirming his sentence "create[d] such potential for the intrusion of arbitrary influences into his sentence as to violate his constitutional rights . . ." *Stephens v. Zant*, 631 F.2d 397, 405 (5th Cir.1980), *modified*, 648 F.2d 446 (5th Cir.1981). Instead, this amorphous claim was first raised in federal court on Stephens' application for a writ of habeas corpus. Although these claims are related, they are very different; the Georgia Supreme Court could not have been apprised of petitioner's federal constitutional claim by his invocation of his state evidentiary claim. Therefore, *Stephens* also involved a case of failure to exhaust state remedies.

Despite Stephens' failure to exhaust the claim he presented to the federal courts, and, as I discuss in the text at 842-843 *infra*, although the Supreme Court could not decipher petitioner's claim because such claim had not been exhausted, the Supreme Court noted that Stephens had "exhaust[ed] his *state post-conviction remedies*," — U.S. at —, 102 S.Ct. at 1855 (emphasis added), and proceeded to address the merits of his claim. Apparently, the Court believed it was enough that Stephens

In *Zant v. Stephens*, Stephens had been convicted of murder in Georgia Superior Court. The sentencing jury found three statutory aggravating circumstances and sentenced Stephens to death. On direct appeal, the Georgia Supreme Court affirmed Stephens' sentence, but held that one of the three aggravating circumstances relied on by the jury was invalid. *Stephens v. State*, 237 Ga. 259, 227 S.E.2d 261, *cert. denied*, 429 U.S. 986, 97 S.Ct. 508, 50 L.Ed.2d 599 (1976). After attempting to exhaust his state remedies,[24] Stephens petitioned the federal district court for a writ of habeas corpus. The district court denied the writ, but on appeal this court struck down Stephens' death sentence because: "It cannot be determined with the degree of certainty required in capital cases that the instruction [which included the improper aggravating circumstance] did not make a critical difference in the jury's decision to impose the death penalty." *Stephens v. Zant*, 631 F.2d 397, 406 (5th Cir.1980), *modified*, 648 F.2d 446 (5th Cir.1981).

On certiorari to the Supreme Court, the Court stated the issue before it as follows: "Today, we are asked to decide whether a reviewing court constitutionally may sustain a death sentence as long as at least one of a plurality of statutory aggravating circumstances found by the jury is valid and supported by the evidence." *Zant v. Stephens*, — U.S. at —, 102 S.Ct. at 1857. In deciding this issue, the Court first identified the state law rule on which the Georgia Supreme Court relied in affirming Stephens' sentence: "'Where two or more statutory aggravating circumstances are found by the jury, the failure of one circumstance does not so taint the proceedings as to invalidate the other aggravating circumstance found and the sentence of death based thereon.'" *Id.* at —, 102 S.Ct. at 1858, *quoting Gates v. State*, 244 Ga. 587, 599, 261 S.E.2d 349, 358 (1979), *cert. denied*, 445 U.S. 938, 100 S.Ct. 1332, 63 L.Ed.2d 772 (1980). The Court then stated: "Despite the clarity of the state rule we are asked to review, there is considerable uncertainty about the state law premises of that rule." *Id.* at —, 102 S.Ct. at 1858 (footnote omitted). Because the Court could not decide the question before it without first determining the state law premises of the rule under consideration, the Court invoked the Georgia certification procedure to ob-

had exhausted his state post-conviction remedies, and that he did not have to exhaust each of his claims. The following considerations negate any suggestion that the Court believed that Stephens had exhausted his claim: first, the Court's failure to say so explicitly; second, both this court's and the Supreme Court's failure to mention, in discussing the merits of his claim, the Georgia Supreme Court's opinion in *Stephens v. Hopper*, the only case in which Stephens may have exhausted his claim. Presumably, if petitioner had exhausted his claim before the Georgia Supreme Court, that court's decision would have been relevant to this court and to the Supreme Court; and third, the Supreme Court's need to invoke the Georgia certification procedure to obtain clarification on a state law question. As discussed below, such clarification probably would have been unnecessary had the Georgia Supreme Court had a chance to rule on petitioner's claim. In sum, one must conclude that the Supreme Court did not believe that petitioner had exhausted his claim.

Because Stephens did not exhaust his claim, and because the Court reached the merits of that claim, *Stephens* compels this court also to reach the merits of petitioner's claim, despite his failure to exhaust. If *Stephens* did not require this court to reach the merits of petitioner's claim, I would be inclined to dismiss the petition without prejudice to petitioner exhausting his claim in state court, despite the state's failure to raise the exhaustion issue. Had petitioner in this case, and respondent in *Stephens*, properly exhausted their claims this court, and the Supreme Court, might have had the benefit of a much clearer presentation of the constitutional issue. Indeed, in *Stephens* the Court was compelled to invoke the Georgia certification procedure in order to seek clarification on a state law question. — U.S. at —, 102 S.Ct. at 1859. Had the Georgia Supreme Court initially had a chance to rule on the claim, and in so ruling, the chance to explain its rationale, the United States Supreme Court may have found it unnecessary to invoke the state certification procedure. This court is now faced with the same problem. Because of unclear state law, which might have been clarified had petitioner properly exhausted his claim, I believe it is necessary to invoke the Florida certification procedure, which this court is compelled to do under *Zant v. Stephens*.

24. See note 23 supra.

tain clarification on this state law point. *Id.* at ——, 102 S.Ct. at 1859. As of the date of this opinion, the United States Supreme Court has not ruled further on *Zant v. Stephens*.

The majority attempts to distinguish *Stephens* by stating: "This case is appreciably different from *Stephens* because there the jury may have considered evidence that it could not constitutionally consider. In this case, no evidence considered was inappropriate for consideration." Majority Opinion at 814. This distinction is totally unpersuasive for several reasons. First, it is abundantly clear that this court did not rely on the admission of improper evidence in finding a constitutional violation in *Stephens*. The court initially did rely on the admission of improper evidence in finding such a violation, *Stephens v. Zant*, 631 F.2d at 406, but later modified the opinion to delete any reference to the introduction of improper evidence, *Stephens v. Zant*, 648 F.2d at 446, although leaving the remainder of the opinion intact. This court's express disclaimer in *Stephens* of any reliance on the introduction of improper evidence demonstrates that the majority is merely groping for a basis to distinguish *Stephens*.

Moreover, a careful reading of the Supreme Court's opinion in *Zant v. Stephens* reveals that the Court itself makes no reference to the introduction of improper evidence. Indeed, the Court's statement of the issue before it demonstrates that the Court was not concerned with improper evidence: "Today we are asked to decide whether a reviewing court constitutionally may sustain a death sentence as long as at least one of a plurality of statutory aggravating circumstances found by the jury is valid and supported by the evidence." —— U.S. at ——, 102 S.Ct. at 1857.[25] This statement makes clear that there is no logical basis for distinguishing the issue presented to the Court in *Stephens* from the issue presented to this court today.[26]

The majority's attempt to distinguish *Stephens* from this case on the basis whether improper evidence was admitted evinces the majority's failure to grasp the fundamental problem with both the Georgia Supreme Court's review in *Stephens* and the Florida Supreme Court's review in this case. What concerned this court and the United States Supreme Court in *Stephens*, and what should concern this court today is how can a reviewing court apply a state law rule, which is, in effect, a conclusive presumption that death is the appropriate penalty in certain situations,[27] to affirm a sen-

25. In *Stephens*, the jury imposed the death sentence. In this case the jury was only advisory, and the trial court imposed the sentence. This difference is not a basis for distinguishing *Stephens*, and the majority makes no attempt to state otherwise. The issue in both *Stephens* and in this case involves the function of the reviewing court. On this issue, it makes no difference whether the sentence is imposed by a judge or by a jury.

26. Although I believe that *Stephens* is indistinguishable from this case, I do not agree with Judge Kravitch's reasoning that the two cases are indistinguishable because in both cases the sentencing court considered improper evidence. Opinion of Kravitch, Circuit Judge, at 866. Judge Kravitch states, in connection with petitioner's sentencing, that "the defendant's 'admi[ssion] [of] the unlawful sale of narcotics drugs,' is irrelevant to any [proper statutory aggravating factors]." *Id.* at 866 n. 42. First, as I state in the text, I believe that neither this court nor the Supreme Court was concerned with the admission of improper evidence in *Stephens*. Second, I believe that Judge Kravitch overlooks that the sentencing court in this case considered the above evidence not only in support of the improper aggravating circumstance that "defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person," Fla.Stat. § 921.141(5)(b), but also to rebut the mitigating circumstance petitioner sought to prove, that "defendant has no significant history of prior criminal activity," Fla.Stat. § 921.141(6)(a). *Ford v. State*, 374 So.2d at 500 n. 1. Therefore, this evidence was properly before the sentencing judge, despite the invalidity of the above aggravating circumstance.

27. The reason the rule amounts to a conclusive rather than a rebuttable presumption is that it is employed on review and, therefore, the defendant has no opportunity to meet the presumption. The fact that a presumption employed on review must be conclusive highlights that presumptions were meant to be used as an evidentiary tool at trial, and not on review. *See* Fed.R.Evid. 301.

tence when it cannot tell whether the trial sentencing court would have imposed the same sentence absent the error found on review.[39] It is this question which the United States Supreme Court asked the Georgia Supreme Court in *Stephens*.

By certifying the above question in *Stephens*, the Court was telling the Georgia Court that unless we misperceive that your role in capital cases is that of a pure reviewing court, the use of a conclusive presumption to affirm a death sentence when you cannot tell whether the same sentence would have been imposed absent the error you found on review, raises serious constitutional problems of arbitrary review. The Court did not, however, exclude the possibility that the Georgia Supreme Court has some resentencing power and that it, therefore, may have acted as a resentencing court. Therefore, the Court invoked the Georgia certification procedure to allow the Georgia Court to explain its sentence-review function.

The notion that an appellate court may act as a resentencing court is by no means foreign to the law, especially in capital cases. The Supreme Court has recognized that state supreme courts have the ultimate state authority to determine sentencing policy by noting, and indeed, requiring, that they ensure relative proportionality in capital sentencing. *See Proffitt v. Florida*, 428 U.S. 242, 253, 96 S.Ct. 2960, 2967, 49 L.Ed.2d 913 (1976). In using this ultimate authority, conferred on it by the legislature, to promulgate state sentencing policy by establishing sentencing norms, see note 17 *supra*, the state supreme court may, in effect, act as a resentencer.

I use the following examples to illustrate the resentencing power of state supreme courts. To the extent such a court takes into account sentencing decisions occurring between the trial court's original sentence and its review of that sentence in ensuring proportionality, the court must be acting as a resentencer because it is considering sentencing standards about which the original sentencer could not have known. In addition, a state supreme court may act as a resentencer when it reverses a sentence of death even though the record fully supports the trial court's imposition of such sentence. In doing so, the court is promulgating a new sentencing norm which is contrary to the norm the trial court applied. Finally, such a court may act as a resentencer in cases like *Ford*. In such cases, the court reimposes the death penalty in circumstances different from, and less egregious than, those on which the trial sentencer relied. The court does this by applying a sentencing norm that the trial sentencer did not need to consider. Having stated these possible examples, I need express no opinion on the constitutional limitations of this resentencing power.

The Supreme Court in *Stephens* was asking the Georgia Court, therefore, whether it affirmed Stephens' sentence in its capacity merely as a reviewing court or whether it used its resentencing power first to promulgate a sentencing standard controlling Stephens' case, and then to resentence Stephens to death. Without knowing which of the above was true, the Supreme Court could not decipher, as I discuss at 842-843 *infra*, Stephens' constitutional claim because the nature of his claim depended on what the state law premises, *i.e.*, the rationale, for the conclusive presumption rule at issue were.

This case is identical to *Stephens* in that this court also cannot decipher petitioner's constitutional claim. Although the state law rule on which the Florida Supreme Court relied in affirming petitioner's sentence is clear, the state law premises of that rule are unclear. In *Ford v. State*, the Florida Court stated: "[E]ven though there was error in assessment of some of the statutory aggravating factors, there being no mitigating factors present death is presumed to be the appropriate penalty." 374 So.2d at 503. Despite the clarity of this conclusive presumption rule, the Florida Supreme Court, like the Georgia Supreme

39. As I discuss in the text at 843 *infra*, Justice Sundberg of the Florida Supreme Court foresaw this problem in *Alledge v. State*, 346 So.2d 998 (Fla.1977).

Court in *Stephens*, has never explained the rationale for this rule.[29] Therefore, this court must adhere to *Stephens* and invoke the Florida certification procedure to seek clarification from the Florida Supreme Court on its sentence-review function in *Ford*.[30]

The majority appears to believe that there is no need for certification because the Florida Supreme Court has explained the rationale for its conclusive presumption in two cases cited in *Ford*: *Elledge v. State*, 346 So.2d 998 (Fla.1977), and *State v. Dixon*, 283 So.2d 1 (Fla.1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1951, 40 L.Ed.2d 295 (1974). In deciding that we need not certify the state law question at issue, the majority errs in the following respects. First, it is impossible to discern from *Elledge* and *Dixon* the rationale for the rule invoked in *Ford* that death was presumed to be the appropriate penalty because *Elledge* is largely inconsistent with *Ford*, and *Dixon* provides us with little guidance. As I discuss later, *Elledge*, *Dixon*, and *Ford* provide at least four possibilities for the rationale for the rule. Second, I believe the majority fails to understand clearly that until we can determine the state law premises for the rule in question, we cannot frame petitioner's constitutional claim. In fact, the majority does not frame petitioner's constitutional claim in explicit terms because it is not really sure what that claim is. This court accomplishes nothing in attempting to adjudicate a claim the nature of which we cannot know. The majority's decision is, therefore, a futile exercise in provisional decision making. It is provisional because the Florida Supreme Court, as the ultimate interpreter of state law, would always be free to reject the rationale that the majority imputes to that court for the *Ford* presumption. Third, the majority fails to perceive that the rationale it discerns, out of the many possible rationales, is the one that frames petitioner's constitutional claim in the light most favorable to him. Under the majority's interpretation of the Florida Supreme Court's rationale, petitioner presents a serious constitutional claim which the majority fails to address adequately. I now discuss the majority's three failures in greater detail.

To understand the possible rationales presented by *Dixon*, *Elledge*, and *Ford* it is necessary to examine those cases. *Dixon* was a case in which the Florida Supreme Court used four consolidated cases, three of which were before the court on questions certified from circuit courts, to determine the constitutionality of certain aspects of the Florida death penalty statute. The presumption language, which the Florida Court seized on in *Ford* to state that death is presumed to be the appropriate penalty when there are some statutory aggravating circumstances and no mitigating circumstances, began in *Dixon* when the Florida Supreme Court, in the course of describing the death penalty statute, turned from discussing aggravating circumstances to discussing mitigating circumstances, and stated, by way of transition: "When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances . . . ." 283 So.2d at 9. This statement

29. The Florida Supreme Court has invoked the rule at issue in the following cases: *Enmund v. State*, 399 So.2d 1362, 1373 (Fla.1981); *Armstrong v. State*, 399 So.2d 953, 962-63 (Fla. 1981); *Sireci v. State*, 399 So.2d 964, 971 (Fla. 1981); *Demps v. State*, 395 So.2d 501, 506 (Fla.), *cert. denied*, 454 U.S. 933, 102 S.Ct. 430, 70 L.Ed.2d 239 (1981); *Brown v. State*, 381 So.2d 690, 696 (Fla.1980), *cert. denied*, 449 U.S. 1118, 101 S.Ct. 931, 66 L.Ed.2d 847 (1981); *Dobbert v. State*, 375 So.2d 1069, 1071 (Fla. 1979), *cert. denied*, 447 U.S. 912, 100 S.Ct. 3000, 64 L.Ed.2d 862 (1980); *Hargrave v. State*, 366 So.2d 1 (Fla.1978), *cert. denied*, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979); *LeDuc v. State*, 365 So.2d 149, 152 (Fla.1978), *cert. denied*, 444 U.S. 885, 100 S.Ct. 175, 62 L.Ed.2d 114 (1979).

30. Florida Rule of Appellate Procedure 9.150(a) provides: "Upon either its own motion or that of a party, the Supreme Court of the United States or the United States Court of Appeals may certify a question of law to the Supreme Court of Florida whenever the answer is determinative of the cause and there is no controlling precedent of the Supreme Court of Florida."

was unnecessary to the court's disposition of any of the consolidated cases before it, none of which presented the question this court confronts today, and was, therefore, dicta.

The above language may be read in the context in which it was stated in one of two ways, the first of which I consider the much more likely. First, it is almost beyond question that this statement is nothing more than the Florida Court's interpretation of general legislative intent. The court was merely interpreting the language of the Florida statute providing that the judge and jury, if they have found sufficient aggravating circumstances, must determine whether mitigating circumstances outweigh aggravating circumstances. Fla.Stat. § 921.141(2)(b) & (3)(b). See note 3 *supra*. The court's statement in *Dixon* amounts probably to nothing more than an abstract reference to the legislature's intent that if the sentencer finds some aggravating circumstances, it will usually impose the death penalty, unless it also finds some mitigating circumstances to balance against the aggravating circumstances.[31] The statement is, therefore, nothing more than the court's recognition that the legislature devised a balancing test for sentencing in capital cases. As such, and because this statement was not applied to any of the cases consolidated in *Dixon*, the court did not mean to state a rule of law to be applied in cases like *Ford*. Viewed as such, *Dixon* provides this court with no positive guidance in determining the rationale in question, and therefore, provides the majority with no basis for imputing a rationale to the Florida Supreme Court.

A second, very remote interpretation of this statement is that the court in *Dixon* was using its supervisory power over circuit courts to send to them the following message: if you have found more than one aggravating circumstance and no mitigating circumstances, and you impose the death penalty, we will presume that you intended to impose the death penalty based on each aggravating circumstance standing alone unless you have stated otherwise in your findings of fact and conclusions of law. This second possibility amounts to the Florida Supreme Court's pronouncement of an instruction to the circuit courts that it will construe their findings and conclusions in the manner prescribed. Although the court may have meant so to instruct the circuit courts, no language in *Ford* even suggests that they were doing so. Consequently, the statement in *Dixon* is most likely a mere interpretation of general legislative intent that a balancing test be applied in capital cases. As such, *Dixon* is of little use to this court because it provides no rationale for the presumption in question.

In *Elledge* the Florida Supreme Court was faced with a case in which there were some proper aggravating circumstances, some improper aggravating circumstances, and, most important in distinguishing *Elledge* from *Ford*, some mitigating circumstances.[32] In dicta, the court stated that had there been no mitigating circumstances present, "there [would have been] no danger that nonstatutory [aggravating] circumstances have served to overcome the miti-

31. I use the word "usually" because the sentencer clearly has the discretion to impose a sentence of life imprisonment even if it finds many aggravating circumstances and no mitigating circumstances. Fla.Stat. § 921.141(2)(c) & (3).

32. I note that although petitioner introduced mitigating evidence at his sentencing trial, apparently this evidence did not rise to the level of any mitigating circumstances, statutory or otherwise, because the Florida Supreme Court, in applying its presumption rule in *Ford*, explicitly stated that there were "no mitigating factors present." 374 So.2d at 503. It is not clear to me from the sentencing court's order whether this was in fact the case. The sentencing court concluded: "There are no mitigating circumstances existing—either statutory or otherwise—which outweighs any aggravating circumstances, to justify a sentence of life imprisonment rather than a sentence of death." *Id.* at 501 n. 1. This statement is ambiguous. It may mean that no mitigating circumstances existed at all, or that those that did exist did not outweigh the aggravating circumstances present. Nevertheless, the Florida Supreme Court adopted the former interpretation, and I accept that interpretation for purposes of adjudicating petitioner's claim.

gating circumstances in the weighing process which is dictated by our statute." 346 So.2d at 1003. It is this dicta on which the majority seizes in finding the rationale for the rule invoked in *Ford* that death was presumed to be the appropriate penalty.

The majority makes the mistake of looking no further than this *Elledge* dicta. Had the majority also considered the *Elledge* holding, it would have seen that the rationale for the rule of presumption applied in *Ford* is confused to say the least. After determining that the sentencing court had found some mitigating circumstances, the *Elledge* court framed the inquiry thus:

> Would the result of the weighing process by both the jury and the judge have been different had the impermissible aggravating factor not been present? We cannot know. Since we cannot know and since a man's life is at stake, we are compelled to return this case to the trial court for a new sentencing trial at which the [impermissible] factor ... shall not be considered.

Id. (citations omitted).

The above language is a clear holding, which, as I discuss at 843 *infra*, is based on federal constitutional grounds, that when the Florida Supreme Court cannot tell from the sentencer's findings and conclusions whether it would have imposed the death sentence absent any invalid aggravating circumstance, it is "compelled to return [the] case to the trial court for a new sentencing trial." This language suggests that the Florida Supreme Court, in reviewing death sentences, acts as a pure reviewing court and does not act as a resentencing court. However, *Elledge* does not preclude the possibility that the court has some resentencing power, but that it must restrain itself from resentencing when it cannot tell whether the trial court would have imposed the death sentence absent any invalid circumstance.

Rather than using the *Ford* opinion to explain its function in reviewing capital cases, the Florida Supreme Court confused matters further by affirming petitioner's sentence with a brief statement of the rule at issue: "[E]ven though there was error in assessment of some of the statutory aggravating factors, there being no mitigating factors present death is presumed to be the appropriate penalty" (citing *Elledge* and *Dixon*). The affirmance of petitioner's sentence, in conjunction with the *Elledge* holding, raises at least three possible rationales, in addition to those *Dixon* raises, for the court's use of the above presumption.

The first possible rationale is that the Florida Supreme Court, acting in its capacity as a reviewing court, was able to tell from the trial court's order that the trial court would have imposed the death sentence absent the invalid circumstances. This possibility is consistent with *Elledge* but it is unlikely for two reasons. First, the Florida Supreme Court, in examining the findings of fact and conclusions of law of the sentencing court, did not, and could not, point to any statement in which the court indicated what it would have done absent the invalid circumstances. It is possible that in such a situation the sentencing court would have given petitioner a life sentence. Without a statement from the sentencer about what it would have done absent the invalid circumstances, we would have to assume that the Florida Supreme Court is able to read the mind of the sentencing judge. Obviously, we cannot make this assumption. Second, the Florida Supreme Court itself has lent support to the proposition that it could not tell in *Ford* whether the sentencing court would have imposed the same sentence absent the invalid circumstances, because it relied on a presumption that death is the appropriate penalty when there are some aggravating circumstances and no mitigating circumstances. If the Florida Court was able to tell whether the sentencing court would have imposed the death sentence absent the invalid circumstances, it would have had no need to invoke any presumption. The court's presumption logically should come into play only when the court cannot tell what the sentencing court would have done absent the invalid circumstances. The first possibility I pose is, therefore, unlikely.

A second possible rationale is that the Florida Supreme Court in *Ford* could not tell whether the trial court would have imposed the same sentence, but acted in its capacity as a resentencing court, rather than merely as a reviewing court, to resentence petitioner to death.[33] This alternative is not totally inconsistent with *Elledge* if we interpret the court in *Elledge* as not precluding the possibility that it may sometimes act as a resentencing court. It is clear, however, that the court in *Ford*, by affirming the sentence rather than remanding the case for resentencing, did not show the same restraint as did the *Elledge* court, which, assuming it acted as a resentencer, felt compelled not to resentence because it could not tell whether the original sentencer would have imposed the death penalty, absent the invalid circumstance.

There is some language in *Ford* to support this second interpretation. The court stated: "*We* . . . make the specific finding that the killing was 'especially heinous, atrocious, or cruel' under [the Florida statute]" (emphasis added). This statement implies that the court exercises some resentencing power because if it did not exercise such power, it would be irrelevant what it finds. If it was acting purely as a reviewing court, the only relevant inquiry would be what the sentencing court found. Moreover, to the extent the *Ford* court relied on the dicta in *Elledge* in affirming petitioner's sentence, it, in effect, acted as a resentencer because *Elledge* was decided after the trial court imposed petitioner's sentence and, therefore, that court could not have known about *Elledge*. Nevertheless, we still must seek clarification from the Florida Supreme Court, because the above language is not strong enough to negate a third possibility, which I read the majority opinion as embracing.[34]

The third possible rationale is that, although the Florida Court in *Ford* could not tell whether the sentencer would have imposed the death sentence absent the invalid circumstances, it acted in its capacity as a pure reviewing court, and "logically presumed the weighing process would have reached the same outcome even had the sentencing court not added to the scales those aggravating circumstances found impermissible." Majority Opinion at 815. This possibility requires this court to conclude that the Florida Supreme Court in *Ford* overruled sub silentio *Elledge*, the holding of which is based on federal constitutional grounds, as I discuss at 843 *infra*, and which holding compels the court to return for resentencing cases in which it cannot tell whether the trial court would have imposed the death sentence ab-

33. Although the supreme court's statement of its role in *Brown v. Wainwright*, 392 So.2d 1327 (Fla.), *cert. denied*, 454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981), tends to negate that it acts as a pure resentencing court, I do not believe that *Brown*, in which the court was faced with a claim totally different from the one here, see Part V *supra*, eliminates this possibility. The court may in some instances act as a resentencing court, yet still have no discretion, under state law, to consider nonrecord material in performing its resentencing function.

34. Similarly, I read Chief Judge Godbold also as embracing the third possibility. He suggests that the Florida Supreme Court in *Ford* applied a rule of "harmless error." If the Florida Court acted as a resentencer, the second possibility I have posed, it would probably not apply a rule of harmless *error* because the error most likely would be *irrelevant*, rather than harmless. The term "harmless" connotes harmless to the trial court's sentence. If the court used a harmless error rule as a resentencer in *Ford*, it would have had to explain what relevance the trial court's original sentence had to its resentence. Because no such explanation exists, it is unlikely that the court applied a rule of harmless error as a resentencing court. The first possibility I have posed, that the court, as a reviewing court, knew what the sentencer would have done is so at odds with reality, as discussed in the text at 840 *supra*, that I cannot read the chief Judge's opinion as embracing it. Therefore, he must be embracing the third possibility, as does the majority. Although the Chief Judge recognizes the seriousness of the petitioner's claim as framed by the third rationale, which the majority does not, he fails, as does the majority, to recognize that the rationale he imputes to the Florida Supreme Court is only one of many possibilities and that until we can determine conclusively the proper rationale, we cannot decipher petitioner's constitutional claim, and, therefore, cannot decide this case.

sent any invalid circumstances. Although the Florida Supreme Court is free to overrule its own interpretation of the Federal Constitution, the likelihood that the court overruled sub silentio the federal constitutional holding of a case the dicta of which—that when there are some aggravating circumstances and no mitigating circumstances there is no danger that invalid aggravating circumstances have skewed the weighing process in favor of death—it cited in direct support of its holding appears unlikely. The majority fails to address this problem.

Nevertheless, for purposes of argument, I concede that the third possibility is, in fact, a valid possibility. It is arbitrary, however, for this court to choose this possible rationale out of the variety of rationales previously discussed, not to mention any other rationales that the Florida Supreme Court may explicate, especially in light of the confusion engendered by the interplay of *Dixon*, *Elledge*, and *Ford*. The majority's failure to allow the Florida Supreme Court the chance to alleviate this confusion reflects its lack of understanding of the various possible rationales for the rule in question.

Having described the majority's first major failure, that it does not perceive the numerous possible rationales for the presumption rule in question, I now turn to the majority's failure to perceive clearly that until this court knows the rationale for the presumption, we cannot frame petitioner's constitutional claim. Indeed, petitioner cannot frame his own claim at this point for his claim takes a different form depending on which of the possible rationales is the true one.

The United States Supreme Court certified the state law question in *Zant v. Stephens* because it could not frame petitioner's constitutional claim without knowing the role of the Georgia Supreme Court in reviewing death sentences. We are in the same posture in this case. For example, if the Florida Supreme Court acted in *Ford* only as a reviewing court, petitioner's claim is that it is unconstitutional for a reviewing court arbitrarily to affirm sentence when it cannot tell whether the sentencing court would have imposed the same sentence absent the error found on review. However, if the Florida Court acted also as a resentencing court, petitioner would have to rely on a claim, for example, that the Florida Supreme Court unconstitutionally overstepped its power as a resentencing court by affirming sentence in this case. We cannot know exactly what petitioner's claim is, and therefore we obviously cannot decide this case, until we know exactly what the Florida Supreme Court did in *Ford*.

The majority's attempt to decide a claim the basis for which we cannot decipher is an exercise in total futility. In fact, the majority never describes petitioner's claim in explicit terms. At the outset, it is important to note that we are dealing with an unexhausted claim, the significance of which escapes the majority. Had petitioner properly exhausted his claim in state court, the Florida Supreme Court would have had a chance to explain the rationale for the rule in question, and this court would not now be in the position of being asked to adjudicate a claim whose form cannot be determined. Unfortunately, we must do the best we can with this claim because *Zant v. Stephens* also involved an unexhausted claim and the Supreme Court, instead of dismissing the claim for want of exhaustion, attempted to determine the merits of the claim. Reluctantly, this court must do the same.[35]

The best this court can do in this case, however, is to seek clarification from the Florida Supreme Court. By rejecting petitioner's amorphous claim on the merits and denying the writ, the majority accomplishes nothing. The petitioner will merely petition the Florida Supreme Court for a writ of habeas corpus[36] and require the Florida

35. See note 23 *supra*.

36. At this point, a petition for a writ of habeas corpus would probably be the only way in which petitioner could present this claim di-

Supreme Court to explain its presumption rule by presenting the same constitutional challenge to that court he now presents to this court. The Florida Supreme Court will then have to address squarely the constitutionality of its challenged practice, and in doing so explain the rationale for the rule. Assuming that court holds against petitioner, he would be free to come back to federal court with a properly crystallized constitutional claim. If the state suggests that the federal courts have already rejected petitioner's claim by this court's decision today, the petitioner will assert merely that this court could not have rejected petitioner's claim, because at this point *no one knows what that claim is*. Therefore, the majority's premature attempt to rid this court of petitioner's claim will only come back to haunt this court at some future time. The circuitous path the majority takes in deciding this claim is totally at odds with the notion of finality, which notion is of utmost importance in the area of federal habeas review. We can avoid the needless litigation described above merely by asking the Florida Supreme Court directly to explain its use of the *Ford* presumption.[37]

Finally, the majority fails to recognize that the rationale it imputes to the Florida Supreme Court, which rationale the Florida Court is free to reject, presents petitioner with his strongest constitutional claim. In fact, Justice Sundberg of the Florida Supreme Court held in favor of such a claim in *Elledge*. Under the majority's interpretation of the proper rationale, petitioner's claim is that it is unconstitutional in a capital case for a reviewing court that finds error and that cannot tell from the findings of fact and conclusions of law of the sentencing court whether that court would have imposed the death penalty absent the error, to affirm the death sentence by invoking an arbitrary presumption that death is the "proper" penalty when there are some statutory aggravating circumstances and no mitigating circumstances. Certainly, this claim is not to be taken lightly. I need go no further than to quote the following language of Justice Sundberg in support of the Florida Court's holding in *Elledge* that it was constitutionally "compelled" to return a case for resentencing when it could not tell what the sentencer would have done absent the invalid circumstance:

> This result is dictated because, in order to satisfy the requirements of *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), the sentencing authority's discretion must be "guided and channeled by requiring examination of *specific factors* that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition." (Emphasis supplied) *Proffitt v. Florida*, 428 U.S. 242, 258, 96 S.Ct. 2960, 2969, 49 L.Ed.2d 913.

346 So.2d at 1003. The majority is, of course, free to reject Justice Sundberg's interpretation of the Federal Constitution. I quote from Justice Sundberg only to emphasize the seriousness of petitioner's constitutional claim. The majority handles this claim in three brief paragraphs which simply do not deal with petitioner's claim.

In sum, the majority opinion is deficient in the three important respects enumerated above. First, it fails to realize that it is arbitrary for us to choose one possible rationale for the presumption in question from among the various possibilities. Second, and most important for purposes of the result in this case, it fails to recognize that because there exists numerous possible

rectly to the Florida Supreme Court. A rehearing would almost certainly not be available. *See* Fla.R.App.P. 9.330(a) & (b).

37. As I describe at note 23 *supra*, the notion of finality would best be served if courts were careful to dismiss unexhausted claims. This case is the ultimate example of a claim the form of which no one can determine because of petitioner's failure to exhaust his state remedies. The courts should not, however, accept total blame for the quandary we are in today. The state, which is often heard to complain that federal courts are not sensitive enough to the finality of state proceedings, must share some of the blame because of its failure to raise in federal court the petitioner's failure to exhaust.

rationales for the *Ford* presumption, and because each rationale provides petitioner with a different constitutional claim, we cannot decide the amorphous claim with which we are now presented. Finally, the majority fails to realize that the rationale it imputes to the Florida Supreme Court provides petitioner with a serious constitutional claim, the merit of which the majority does not address.

Because the state law premises for the presumption in question are unclear, *Stephens*, which involved a similar and indistinguishable rule of presumption, compels this court to certify to the Florida Supreme Court almost the identical question the United States Supreme Court certified to the Georgia Supreme Court: "What are the premises of state law that support the conclusion that the death sentence in this case is not impaired by the invalidity of [three] of the statutory aggravating circumstances found by the [sentencing judge]?" —— U.S. at ——, 102 S.Ct. at 1859.

Based on the preceding analysis, I respectfully dissent from Part III of the majority opinion.

VII.

In conclusion, I adopt the decision of the panel on issues 1, 4, and 6, as those issues are stated in this opinion, *supra* at 824. I concur in the result this court reaches on issues 2, 3, and 5. My disposition of the *Stephens* issue, issue 7, is that this court must await the resolution of a state law question by the Florida Supreme Court before ruling on petitioner's application for a writ of habeas corpus.

KRAVITCH, Circuit Judge, concurring in part and dissenting in part:

I do not agree with the majority's per curiam disposition of this case. In my view it is the responsibility of this court to defer issuance of the opinion pending the Supreme Court's final disposition in *Stephens v. Zant*, 631 F.2d 397 (5th Cir.1980), *reh. denied and modified*, 648 F.2d 446 (5th Cir. 1981), *certified to Supreme Court of Georgia*, —— U.S. ——, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982) and *Barclay v. Florida*, 411 So.2d 1310 (Fla.1982), *cert. granted*, —— U.S. ——, 103 S.Ct. 340, 74 L.Ed.2d —— (1982).[1]

Because, however, the majority has adopted the procedure outlined in the per curiam, I proceed to the merits of Ford's appeal.

[6–11, 16–23] Although I concur in Parts IV, VI,[1a] and VII of the majority's opinion

1. Additionally, I have reservations that Fed.R. App.P. 42(b) can be interpreted to preclude appellant's effort to dismiss his appeal. Rule 42(b) can be interpreted as giving an appellant the right to dismiss an appeal subject only to terms properly fixed by the court or the parties. In my view, no such terms are in force here. I question whether a timeliness restriction is a term that can be "fixed by the court," particularly *subsequent* to the filing of the motion to dismiss. Furthermore, there is a possible Article III case or controversy problem, going to the heart of our power to issue this opinion, which is raised by appellant's effort to dismiss his appeal. *See, e.g., United States Parole Commission v. Geraghty*, 445 U.S. 388, 397, 100 S.Ct. 1202, 1209, 63 L.Ed.2d 479 (1980), quoting Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L.J. 1363, 1384 (1973) (" 'requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)' "). This issue deserves more thorough consideration.

1a. In Part VI, the majority addresses petitioner's claim that the Florida Supreme Court failed to apply a consistent standard of review in affirming the trial court's findings on aggravating and mitigating factors. Having reviewed petitioner's claim, I agree with the majority that the Florida Supreme Court's affirmance of these findings was consistent with its prior decisions and was not arbitrary, capricious, or otherwise in violation of petitioner's eighth amendment rights. Although I am in basic agreement with the majority's reasoning on this issue, one point needs clarification. The majority's statement that federal courts "will not undertake a case-by-case comparison of the facts in a given case with the decisions of the state supreme court," Majority Opinion, *supra* at 819 (citing *Spinkellink v. Wainwright*, 578 F.2d 582, 604-05 (5th Cir.1978), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979)), correctly articulates the fundamental principle that federal courts do not sit to review state courts' decisions on matters of state law. This statement should not be understood to deny the federal courts

and its conclusion in Part V,[2] I write separately because I disagree with the majority's resolution of the sentencing issues in Parts I, II, and III. In my view, Supreme Court and former Fifth Circuit precedents[3] compel reversal on the claim that the state court considered extra-record information in reviewing petitioner's sentence and on the aggravating and mitigating circumstances claims.

I.

Brown *Issue: Florida Supreme Court's Consideration of Extra-Record Materials*

Petitioner claims the Florida Supreme Court violated his constitutional rights by reviewing reports, evaluations, and other materials relevant to his character that he was unaware were being used and was afforded neither access to nor an opportunity

authority to review state courts' application of capital sentencing criteria for compliance with federal constitutional requirements, however. *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) demonstrates that such review is proper and that federal courts will reverse death sentences that—though based on proper statutory criteria—reflect an interpretation of such criteria so vague or broad as to violate the eighth amendment requirement of channelled sentencer discretion. Comparison of the case in which such federal challenge is being made to other cases in which the state court has applied the statutory criteria, albeit not conclusive, is relevant to the determination whether the criteria are being constitutionally applied. *See id.* at 429-33, 100 S.Ct. at 1765-67. The language in the *Spinkellink* opinion reflecting a contrary view is no longer valid after *Godfrey*.

2. In Part V of its opinion, the majority states three reasons for rejecting petitioner's argument that his rights under *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) were violated by the state courts' failure to require that the sentencer find beyond a reasonable doubt that there were insufficient mitigating factors to outweigh the aggravating factors. I join in the majority's conclusion that petitioner's claim must be rejected for the third reason stated in the opinion. Ford's argument confuses the process of finding facts, to which the *Winship* case was addressed, with the altogether different process of weighing circumstances. The weighing process, which occurs only after the relevant facts have been found, necessarily involves subjective, normative judgments on the part of the sentencing tribunal. To apply the standard that was designed to govern the quantum of proof to the process of normative judgment simply does not make sense. For this reason only, I concur in the majority's rejection of petitioner's fifth claim.

I do not agree with the other reasons articulated by the majority for rejecting this claim, however. The first reason the majority states is that the due process standard established in *Winship* governing burden of proof in criminal cases has no bearing on the sentencing phase of a capital trial. Such statement in effect decides petitioner's alternative argument—that proof of the *existence* of aggravating and mitigating factors must be sufficient to meet the *Winship* beyond-a-reasonable-doubt standard. As the majority notes, Majority Opinion, *supra* at 819, this latter assertion was not made before the panel and is not properly before the en banc court. For this reason, and because the extent of due process protection to which capital defendants are entitled at sentencing is an open and difficult question that should not be reached without full briefing and argument, *see Gardner v. Florida*, 430 U.S. 349, 358 & n. 9, 97 S.Ct. 1197, 1204 & n. 9, 51 L.Ed.2d 393 (1977), I would not dispose of petitioner's claim on such broad grounds. Nor do I agree with the majority's reliance on *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), in which the Supreme Court upheld Florida's capital sentencing statute on its face, as a basis for rejecting petitioner's *Winship* claim. The Supreme Court in *Proffitt* was not asked to decide the issue raised by petitioner here, nor did it decide that issue gratuitously. It held only that the statutory aggravating and mitigating factors, as related in the trial court's instructions in that case, were sufficiently narrow and well-defined to overcome the problems of arbitrary and unguided sentencing identified in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). An approach to constitutional decisionmaking that construes the Supreme Court's approval of a statute on certain constitutional grounds as validating the enactment against any other constitutional challenge, though an easy method of avoiding difficult questions, in my view constitutes a serious abdication of judicial responsibility. Hence, I do not join in that part of the majority's reasoning.

3. This court is bound by prior decisions of the former Fifth and Eleventh Circuits unless the en banc court expressly overrules them. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981) (en banc).

to rebut. Petitioner initially raised this claim with 122 other capital defendants in a habeas action in the Florida Supreme Court. *Brown v. Wainwright*, 392 So.2d 1327 (Fla.), *cert. denied*, 454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981). The Florida court accepted arguendo the "petitioners' most serious charges," *id.* at 1331, but held that as a matter of law petitioners were not entitled to relief, *id.* at 1331–33. Its reasoning in rejecting the claim was twofold. First, it declared that extra-record materials are "irrelevant" to, and "play no part in," its review of capital sentences. *Id.* at 1331, 1332. Second, it held that the rule in *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), on which petitioners relied was inapplicable to situations where extra-record information was considered only at the review stage and not during the initial sentencing proceeding. *Id.* at 1331–33.

A. *Was the Challenged Practice Constitutional?*

The state adopts the Florida Supreme Court's argument that *Gardner*, which reversed a death sentence imposed by a trial judge after reviewing nonrecord evidence, is inapplicable to an appellate tribunal's review of nonrecord materials. The majority—although ultimately declining to decide the merits of petitioner's *Gardner* claim—alludes to the above argument in an attempt to trivialize petitioner's constitutional claim.[4] The principles the Supreme Court articulated in *Gardner*, however, which are at the core of its recent constitutional precedents on capital sentencing, condemn with equal force the review of nonrecord information by appellate and trial courts.

1. *Constitutional Underpinnings of Gardner*

Despite a long jurisprudential tradition of relaxed procedural requirements and largely discretionary decisionmaking at the sentencing stage, *see, e.g., United States v. Tucker*, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972); *McGautha v. Maryland*, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971); *Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949); *see generally* Note, *The Constitutionality of Statutes Permitting Increased Sentences for Habitual or Dangerous Criminals*, 89 Harv.L.Rev. 356, 359–73 (1975), the last decade has seen substantial change in the constitutional law governing sentencing in capital cases. In *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) several members of the Supreme Court first articulated the view, now espoused by a majority of the Court,[5] that the significance of the sentencing process and its effect on the defendant are greater in cases involving the death penalty, which "differs from all other forms of criminal punishment, not in degree but in kind." *Id.* at 306, 92 S.Ct. at 2760 (Stewart, J., concurring). *See id.* at 286–91, 92 S.Ct. at 2750–53 (Brennan, J., concurring); *id.* at 314–71, 92 S.Ct. at 2764–93 (Marshall, J., concurring). *Furman* thus held that imposition of the death penalty violates the eighth amendment where the

4. The argument that *Gardner* is inapplicable originated in the Florida Supreme Court, *Brown v. Wainwright*, 392 So.2d at 1331–33, and was adopted *in toto* by the panel majority, *Ford v. Strickland*, 676 F.2d at 444. The *en banc* majority refers to it approvingly. *See* Majority Opinion, *supra* at 810 & n. 2 (emphasizing *Gardner*'s holding that "death sentence may not be *imposed* . . . on nonrecord, unchallengeable information" and noting that determination whether use of nonrecord information in this case was unconstitutional "[t]o some extent . . . turns on whether the Florida Supreme Court is 'imposing' sentence or doing something qualitatively different. *See Brown v. Wainwright*, 392 So.2d at 1331").

5. *See Gardner v. Florida*, 430 U.S. at 357, 97 S.Ct. at 1204 (citing various concurring and dissenting opinions in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) and *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)). *See also Eddings v. Oklahoma*, 455 U.S. 104, 118, 102 S.Ct. 869, 878, 71 L.Ed.2d 1, 13 (1982) (O'Connor, J., concurring); *Lockett v. Ohio*, 438 U.S. at 604, 98 S.Ct. at 2964 (Burger, C.J., joined by Stewart, Powell, and Stevens, JJ.) ("qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed").

process by which it is imposed is standardless and arbitrary. *Furman's* 1976 progeny[6] reaffirmed this principle, emphasizing that capital sentencing procedures must not create "a substantial risk that the death penalty [will] be inflicted in an arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859 (1976) (opinion of Powell, Stewart & Stevens, JJ.); *id.* at 207, 220–22, 96 S.Ct. at 2941, 2947–48 (White & Rehnquist, JJ. & Burger, C.J., concurring); *Jurek v. Texas*, 428 U.S. 262, 274, 276, 96 S.Ct. 2950, 2958, 49 L.Ed.2d 929 (1976) (opinion of Powell, Stewart & Stevens, JJ.); *id.* at 277, 279, 96 S.Ct. at 2958, 2959 (White & Rehnquist, JJ. & Burger, C.J., concurring); *Proffitt v. Florida*, 428 U.S. 242, 252–53, 258, 96 S.Ct. 2960, 2966–67, 2969, 49 L.Ed.2d 913 (1976) (opinion of Powell, Stewart & Stevens, JJ.); *id.* at 260–61, 96 S.Ct. at 2970 (White & Rehnquist, JJ. & Burger, C.J., concurring). In these cases a majority of the Court held that sentencer discretion in capital cases must be "directed and limited" to provide consistent and rational imposition of the death penalty, *Gregg v. Georgia*, 428 U.S. at 189, 96 S.Ct. at 2932–33 (opinion of Powell, Stewart & Stevens, JJ.); *id.* at 220–22, 96 S.Ct. at 2947 (White & Rehnquist, JJ. & Burger, C.J., concurring); *Proffitt v. Florida*, 428 U.S. at 255–58, 96 S.Ct. at 2968–69 (opinion of Powell, Stewart & Stevens, JJ.); *id.* 260–61, 96 S.Ct. at 2970 (White & Rehnquist, JJ. & Burger, C.J., concurring); *Jurek v. Texas*, 428 U.S. at 270–74, 276, 96 S.Ct. at 2955–57, 2958 (opinion of Powell, Stewart & Stevens, JJ.); *id.* at 279, 96 S.Ct. at 2959–60 (White & Rehnquist, JJ. & Burger, C.J., concurring), and to ensure "reliability in the determination that death is the appropriate punishment in a specific case," *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (opinion of Powell, Stewart & Stevens, JJ.); *see also Gardner v. Florida*, 430 U.S. 349, 359, 97 S.Ct. 1197, 1205, 51 L.Ed.2d 393 (plurality opinion); *id.* at 362, 363–64, 97 S.Ct. at 1206, 1207–08 (White, J., concurring).

The Court's most recent capital sentencing decisions have continued to focus on minimizing the risk of arbitrary decisionmaking. *See, e.g., Eddings v. Oklahoma*, 455 U.S. 104, 112, 102 S.Ct. 869, 874–875, 71 L.Ed.2d 1, 8–9 (1982); *id.* at 118, 102 S.Ct. at 878, 71 L.Ed.2d at 13 (O'Connor, J., concurring); *Godfrey v. Georgia*, 446 U.S. 420, 427–28, 100 S.Ct. 1759, 1764–65, 64 L.Ed.2d 398 (1980) (plurality opinion); *id.* at 433, 438–42, 100 S.Ct. at 1767, 1769–72 (Marshall & Brennan, JJ., concurring); *Lockett v. Ohio*, 438 U.S. 586, 605, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978) (plurality opinion); *Gardner v. Florida*, 430 U.S. at 358, 97 S.Ct. at 1204–05; *id.* at 363–64, 97 S.Ct. at 1207–08 (White, J., concurring). Whereas earlier cases focused on the quantity of information before the sentencing tribunal, *e.g., Williams v. New York*, 337 U.S. at 247, 69 S.Ct. at 1083, recently the Court has shown greater concern for the quality of such information. *Gardner v. Florida*, 430 U.S. at 359, 97 S.Ct. at 1205; *id.* at 363–64, 97 S.Ct. at 1207–08 (White, J., concurring). The Court has recognized the defendant's interest both in presenting evidence in his favor, *Eddings v. Oklahoma*, *supra* (plurality opinion); *Lockett v. Ohio*, *supra* (plurality opinion); *id.* at 620–21, 98 S.Ct. at 2972–73 (opinion of Marshall, J.), and in being afforded the opportunity to explain or rebut evidence offered against him, *Gardner v. Florida*, 430 U.S. at 362, 97 S.Ct. at 1206–07; *id.* at 363–64, 97 S.Ct. at 1207–08 (White, J., concurring). Reliability in the factfinding aspect of sentencing is the cornerstone of the Court's decisions. *See, e.g., Lockett v. Ohio*, 438 U.S. at 604, 98 S.Ct. at 2964 (plurality opinion); *Gardner v. Florida*, 430 U.S. at 359–60, 362, 97 S.Ct. at 1205; *id.* at 363–64, 97

6. In 1976 the Court considered constitutional challenges to five states' post *Furman* capital sentencing statutes. *See Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976).

S.Ct. at 1207–08 (White, J., concurring); *Woodson v. North Carolina*, 428 U.S. at 305, 96 S.Ct. at 2991 (opinion of Powell, Stewart & Stevens, JJ.).

2. *Gardner*

In *Gardner*, the Court reversed a death sentence imposed on the basis of material not disclosed to the defendant,[7] holding that procedure unconstitutional under the eighth amendment and the due process clause.[8] The plurality rejected the state's asserted justifications for allowing imposition of the death penalty on the basis of confidential information, reasoning that the risk that such information "may be erroneous, or may be misinterpreted, by the investigator or by the sentencing judge, is manifest," and "the interest in reliability [in capital sentencing] plainly outweighs the State's interest in preserving the availability of [such] information." *Id.* at 359, 97 S.Ct. at 1205.

3. *Application of* Gardner

The state's argument that the Constitution does not prohibit consideration of nonrecord information at the appellate level must proceed from one or both of the following premises: that rational appellate review is not an essential component of capital sentencing procedures under the eighth amendment, or that use of nonrecord information without notice to the defendant will not undermine the reliability of appellate review in the same way *Gardner* recognized it would affect the reliability of initial sentencing. Either premise is erroneous.

A meaningful appellate review process is one of the two fundamental requirements of capital sentencing procedures established by the Supreme Court's 1976 death penalty decisions.[9] *See Woodson v. North Carolina*, 428 U.S. at 303, 96 S.Ct. at 2990 (plurality opinion); *Roberts v. Louisiana*, 428 U.S. at 335 & n.11, 96 S.Ct. at 3007 & n.11 (plurality opinion). Indeed, the Court relied on the appellate review provision in upholding the Florida statute under which petitioner was sentenced, viewing it as one of the means by which the statute assured that the death penalty would not be imposed on the basis of passion, prejudice, or any other arbitrary factor. *Proffitt v. Florida*, 428 U.S. at 250–53, 258–59, 96 S.Ct. at 2965–67, 2969–70 (opinion of Powell, Stewart & Stevens, JJ.). *Accord Gregg v. Geor-*

7. In *Gardner*, the trial judge had ordered a presentence investigation after the jury had returned an advisory verdict recommending a life sentence. The judge had then disclosed part, but not all, of the presentence investigation report to the defendant's counsel and, apparently on the basis of the report, had rejected the jury's advisory verdict and sentenced the defendant to death. *Gardner v. Florida*, 430 U.S. at 352–53, 97 S.Ct. at 1201–02.

8. The plurality opinion in *Gardner* expressly held that the sentencing procedure at issue violated the due process clause of the fourteenth amendment. *Gardner v. Florida*, 430 U.S. at 351, 358, 97 S.Ct. at 1201, 1204. The opinion's emphasis on the difference in kind between the death penalty and other punishments, *id.* at 357–58, 97 S.Ct. at 1204–05, rejection of some arguments that it conceded might have merit in noncapital cases, *id.* at 360, 97 S.Ct. at 1205–06, and heavy reliance on *Furman* and other death penalty decisions, *id.* at 360–61, 97 S.Ct. at 1205–06, however, indicate that the plurality's reasoning involved a cross-section of eighth amendment and due process concerns. Justice White's concurring opinion expressed the view that the procedure at issue clearly violated the eighth amendment and thus that there was no need to address the due process issue. *Id.* at 362–64, 97 S.Ct. at 1207 (White, J., concurring). Justice Blackmun concurred in the judgment on the basis of *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) and *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976)—decisions based on the eighth amendment. *Gardner v. Florida*, 430 U.S. at 364, 97 S.Ct. at 1207 (Blackmun, J., concurring). Justice Brennan agreed with the plurality that the procedure at issue violated the due process clause but adhered to his prior opinions stating that the death penalty violates the eighth amendment in all circumstances. *Id.* at 364–65, 97 S.Ct. at 1207–08 (Brennan, J., concurring).

9. The other requirement established in the 1976 cases, having been preordained by *Furman*, was the provision of standards and procedures to limit and direct sentencer discretion. *E.g., Woodson v. North Carolina*, 428 U.S. at 303, 96 S.Ct. at 2990; *Gregg v. Georgia*, 428 U.S. at 196–98, 199, 206–07, 96 S.Ct. at 2936, 2937, 2940–41; *Proffitt v. Florida*, 428 U.S. at 253, 258, 96 S.Ct. at 2967, 2969.

gia, 428 U.S. at 204–06, 96 S.Ct. at 2939–40 (opinion of Powell, Stewart & Stevens, JJ.); *id.* at 211–12, 96 S.Ct. at 2942–43 (White & Rehnquist, JJ. & Burger, C.J., concurring) (Georgia statute's appellate review provision ensures that death penalty will not be imposed capriciously). *Cf. Gardner v. Florida*, 430 U.S. at 360–61, 97 S.Ct. at 1205–06; *id.* at 363–64, 97 S.Ct. at 1207–08 (White, J., concurring) (trial judge's failure to make available to appellate court information he considered in imposing sentence renders sentencing procedure invalid). The careful consideration given by the Supreme Court to the adequacy of the Florida statute's appellate review procedure belies any suggestion that the Court did not consider appellate review integral to capital sentencing. *See Proffitt v. Florida*, 428 U.S. at 258–59, 96 S.Ct. at 2969–70.

Second, an appellate court's reliance on nonrecord information, without providing notice to the defendant of the substance of that information or an opportunity to contest its accuracy, risks arbitrary imposition of death such as was condemned in *Furman*. The state insists that there is no such risk involved here because the appellate court merely reviewed, and did not "impose," petitioner's sentence. If in deciding to *affirm* petitioner's sentence the Florida court reviewed and relied on undisclosed, and possibly inaccurate, information concerning petitioner's character and prison record, however, that court's disregard for the interests of petitioner and society in ensuring that death sentences are predicated on reliable factfinding is no less egregious than the similar actions of the trial judge who imposed the sentence invalidated in *Gardner*. In both situations the "[a]ssurances of secrecy are conducive to the transmission of confidences which may bear no closer relation to fact than the average rumor or item of gossip"; in both the absence of defense counsel's participation precludes the adversarial debate our system recognizes as "essential to the truthseeking function." *See Gardner v. Florida*, 430 U.S. at 359, 360, 97 S.Ct. at 1205, 1206.

Because the procedure here challenged poses the risk that death sentences may be affirmed on the basis of inaccurate information and because meaningful appellate review that minimizes rather than enhances such risk is constitutionally mandated in capital cases, I cannot conclude, as the majority seems to, that no significant constitutional problem is raised by petitioner's claim.

B. *Did the Florida Supreme Court Engage in the Practice of Which Petitioner Complains*

Two allegations form the basis of Ford's *Gardner* claim: (1) that the Florida Supreme Court received nonrecord information about petitioner and other capital defendants; and (2) that the court considered that information in deciding to affirm petitioner's death sentence. Neither the state court nor the district court has resolved these factual contentions.[10] The majority, following the pattern of the *Brown* court, "assume[s] without deciding" the truth of the first allegation. It ultimately skirts the merits of the claim, however, in essence by finding that the Florida court did not consider nonrecord information in affirming

10. As noted above, the Florida Supreme Court in deciding the *Brown* issue assumed arguendo that the petitioners' factual allegations were true. In the district court, petitioner proffered evidence indicating that at the time of his appeal to the Florida Supreme Court that court was engaged in the regular practice of soliciting, receiving, and reviewing extra-record materials of this type—without notifying the parties involved—in connection with its review of capital sentences. Petitioner alleged that much of this material, along with the court's letters requesting it in particular cases, was purged from the court's files, rendering verification that the practice was engaged in in particular cases very difficult. He offered proof that materials of the type routinely solicited by the Florida Supreme Court were contained in his prison files, however, and sought discovery to obtain evidence that the state court had requested nonrecord information in his case. The district court refused to admit the evidence petitioner proffered and denied his request for discovery. It then rejected his claim on the merits because of the absence of direct evidence that the Florida court had viewed any nonrecord information in reviewing Ford's sentence.

petitioner's sentence. In lieu of evidence to support this finding, it relies on statements in the *Brown* opinion and invokes a "presumption of regularity." These factors simply do not substantiate the majority's finding. Its approach can only be characterized as an attempt to evade the difficult questions presented by petitioner's claim. In rendering its finding, the majority relies on three subsidiary "facts": (1) that Florida law does not permit the state supreme court to rely on nonrecord material in affirming capital sentences; (2) that the Florida court would not have relied on such information in contravention of state law; and (3) that the Florida court's reading of nonrecord information would not have affected its decisions because the court would have disregarded that material. The following section examines these premises to determine whether they support the majority's conclusion.

The majority interprets the Florida Supreme Court's decision in *Brown v. Wainwright*, *supra*, to hold that state law prohibits reliance by the supreme court on nonrecord information in affirming capital sentences. It cites language in the *Brown* opinion stating that such material is "irrelevant [ ] to [its] appellate function in capital cases" and "play[s] no part in [its] sentence review role." Majority Opinion, *supra* at 810 (quoting *Brown v. Wainwright*, 392 So.2d at 1331, 1332). Without examining the analysis underlying the Florida court's conclusion, the majority accepts these remarks as determinative of the matter, which it characterizes as concerned solely with state law. Although federal courts are bound by decisions of the highest state court in deciding issues of state law, the majority's adoption of the *Brown* court's reasoning raises issues of federal as well as state law. The Florida court's analysis of its role in capital sentence review conflicts with the interpretation of the state's sentencing statute rendered by the United States Supreme Court in upholding the statute against constitutional challenge. When state law, as interpreted by the state courts, runs head on with principles of federal constitutional law, our foremost responsibility is to the latter.

In *Brown*, the Florida court concluded that nonrecord information is "irrelevant" to its decisions by reasoning that its function in reviewing capital sentences is very limited. The court disclaimed performing any evidentiary review function in capital cases.[11] This characterization of the appellate court's role contradicts the Supreme Court's interpretation of Florida's capital sentencing statute in *Proffitt v. Florida*, *supra*, as requiring the state supreme court to "review[ ] and reweigh[ ]" the evidence and "determine independently whether the imposition of the ultimate penalty is warranted." *Proffitt v. Florida*, 428 U.S. at 253, 96 S.Ct. at 2967 (citing *Songer v. State*, 322 So.2d 481, 484 (Fla.1975); *Sullivan v. State*, 303 So.2d 632, 637 (Fla.1974)). To be sure, it is fully within the Florida Supreme Court's authority, as the ultimate arbiter of state law, to reject the United States Supreme Court's interpretation of state law and adopt the view it espouses in *Brown*. In reinterpreting its review function in capital cases to be substantially different from that the state presented and the United States Supreme Court adopted in *Proffitt*, however, the state court calls into question the continued vitality of the *Proffitt* holding that capital sentencing as administered under the Florida system meets the requirements of the eighth amendment. *Cf. Gardner v. Florida*, 430 U.S. 349, 365-70, 97 S.Ct. 1197, 1208-10, 51 L.Ed.2d 393 (1977) (Marshall J., dissenting) (cursory review by Florida Supreme Court undercuts basis for approval of Florida system in *Proffitt*). Although the *Brown* court's interpretation of its role in reviewing sentences is determinative of that question, if such interpretation was operative at the time of petitioner's direct appeal I would hold that his

11. The court described its role as limited merely to "determin[ing] if the jury and judge acted with procedural rectitude" and "compar[ing] the case under review with all past capital cases to determine whether or not the punishment is too great." *Brown v. Wainwright*, 392 So.2d at 1331-33.

sentence is invalid because he was not accorded the "meaningful appellate review" to which he is entitled under *Proffitt v. Florida*, 428 U.S. at 251, 96 S.Ct. at 2966. *Accord Gregg v. Georgia*, 428 U.S. at 204–06, 96 S.Ct. at 2939–40 (Georgia statute's appellate review provision ensures imposition of death penalty will not be capricious).

The majority's reading of the *Brown* decision as proscribing the use of nonrecord materials in sentence review is undermined by the *Brown* court's emphasis on distinguishing this case from *Gardner v. Florida*, *supra*. The *Brown* court devoted a substantial portion of its opinion to the argument that *Gardner* "presents no impediment" to consideration of nonrecord information at the appellate review, rather than sentence imposition, stage. *See Brown v. Wainwright*, 392 So.2d at 1333.[12] The opinion thus indicates that the Florida courts found no federal constitutional deficiency in the process of reviewing nonrecord information at the appellate stage. Moreover, it implies that the court found no state law barrier to such procedure either because, had it held that state law prevented it from considering nonrecord information, it would have had no reason to decide that such procedure was unobjectionable under federal law. In short, the tenor of the *Brown* opinion suggests the Florida court discerned no defect in the challenged procedure under either state or federal law and that this was the primary basis for its rejection of the petitioner's claim.

The majority concludes, however, that *Brown* holds Florida law precludes the state supreme court from using nonrecord information in reviewing capital cases. The majority next addresses whether the state court may have used nonrecord information despite this proscription. Answering this query in the negative, the majority relies on (1) what it interprets as an affirmative statement by the *Brown* court that nonrecord information was not used in reviewing capital sentences; and (2) a presumption of regularity in the state court proceedings. In addition, the majority justifies its decision on the ground that probing further into the matter would require questioning of the Florida Supreme Court justices concerning their mental processes, which procedure is abhorrent in our judicial system.

I disagree with the majority's view of the *Brown* opinion as unequivocally denying the use of nonrecord information. The Florida court did not deny that it systematically requested and received nonrecord information concerning capital defendants, *see Brown v. Wainwright*, 392 So.2d at 1330–31; indeed it expressly stated that it did obtain such information, *id.* at 1333 n.17. Moreover, the *Brown* court did not specifically disclaim having used the nonrecord information it admittedly obtained; it said only that such information is "irrelevant" to its decisionmaking in view of the narrow functions it performs in reviewing sentences. Even accepting the limited role the Florida court defined for itself in *Brown*, it is not inconceivable that in performing that role the court might have taken into consideration nonrecord information that it had before it.[13] The court itself conceded as

12. The Florida court did

> not find it possible to believe that in *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), the Supreme Court of the United States meant to lay down a principle so pervasive as to require an appellate court to lay out for inspection by the appellant, even in a capital case, all of the information in its hands from which it may seek perspective and guidance in reviewing the propriety of his sentence.

Brown v. Wainwright, 392 So.2d at 1332 (quoting *Ex Parte Farley*, 570 S.W.2d 617, 625–27 (Ky.1978)).

13. *See Brown v. Wainwright*, 454 U.S. 1000, 1002–03, 102 S.Ct. 542, 544, 70 L.Ed.2d 407, 409 (1981) (Marshall, J., dissenting from denial of certiorari):

> When reviewing a sentence for procedural regularity, the court might uphold or vacate the sentence in part on grounds not considered by the trial court, or on factually erroneous grounds, because it has viewed ex parte unreliable, nonrecord information concerning the appellant. And when reviewing sentences for proportionality, the court's comparison of the sentences of other capital defendants with that of the appellant is rendered meaningless if the court has upheld or vacated the death sentences of other individuals after viewing this kind of information, or if the court used possibly erroneous informa-

much by stating that "[t]he 'tainted' information we are charged with reviewing was . . . in every instance obtained *to deal with newly-articulated procedural standards.*" *Id.* (emphasis added).

As a second basis for concluding the Florida court did not consider nonrecord information, the majority states that federal courts must accord a "presumption of regularity" to the state court proceedings—that is, presume that "the state supreme court follows its own law and procedures." Majority Opinion, *supra* at 811. As support for this proposition, the majority cites the federal habeas corpus statute, 28 U.S.C. § 2254(d), and *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981)—a decision interpreting that provision. I agree that there are circumstances in which it is appropriate for federal courts to engage in such a presumption of regularity with respect to state court decisions, but in my view this case does not present such circumstances. First, the authorities cited by the majority are inapposite.[14] Second, the Florida court did not acknowledge that the practice of soliciting and reviewing nonrecord information is legally objectionable. It distinguished *Gardner* as inapplicable to appellate decisionmaking, remarked that petitioners' constitutional claims were "unpersuasive," *Brown v. Wainwright*, 392 So.2d at 1331, and throughout the opinion maintained the position that appellate consideration of nonrecord material would not violate petitioners' rights. The majority presumes that the Florida court did not engage in such practice because in its view to do otherwise would offend the Florida court. Under the Florida court's own interpretation of the governing legal principles, however, there is no impropriety in examining nonrecord information. *See* text *supra* at 850–851. Principles of federalism and comity are not violated by inquiring whether a state court has followed a procedure that *it* has declared to be legally sound.

As a final rationalization for the presumption in which it engages, the majority flashes the spectre of calling the state supreme court justices to the witness stand to testify about their mental processes. There is no question that such procedure, though it may be the only means of obtaining direct evidence to support petitioner's allegations, is barred by prior precedents. *See Fayerweather v. Ritch*, 195 U.S. 276, 25 S.Ct. 58, 49 L.Ed. 193 (1904); *United States v. Crouch*, 566 F.2d 1311 (5th Cir.1978). I agree that it would be impermissible to conduct this type of factual inquiry; I disagree with the majority that we should uphold the Florida Supreme Court's practice because of a lack of direct evidence. First, because such evidence is wholly within the state's control, fairness requires that the state rather than petitioner should suffer the adverse consequences of its absence. *Cf. Jencks v. United States*, 353 U.S. 657, 670–71, 77 S.Ct. 1007, 1014–15, 1 L.Ed.2d 1103 (1957) (government has duty to insure justice is done and thus may invoke evidentiary privileges to suppress evidence in its possession only at price of release of defendant). Second, although we cannot ask the Florida justices directly whether and for what purpose they may have used nonrecord information in reviewing Ford's sentence, we are not faced with a record that is utterly silent on this question.[15] Petitioner

tion only as background data for its proportionality determination. The more systematic the practice of reviewing such information, the greater the danger of this second form of distortion.

14. Section 2254(d) requires federal courts addressing collateral attacks on state court judgments to defer to determinations of fact made by a state court "after a hearing on the merits of the factual issue." The *Brown* court neither received evidence nor held a hearing; instead, it decided the case on the basis of the petitioners' allegations. The Florida court thus rendered no factual finding to which the presumption of correctness under § 2254 applies. Nor does anything in the *Sumner* decision suggest that § 2254 is broader in scope than its terms or encompasses aspects of state court decision other than factual determinations made on the basis of evidence.

15. *Compare* this case *with Harris v. Rivera*, 454 U.S. 339, 102 S.Ct. 460, 70 L.Ed.2d 530 (1981) (mere inconsistency in verdicts insufficient basis for inferring that judge relied on impermissible evidence or nonrecord information).

proffered circumstantial evidence that the Florida court solicited and received nonrecord evidence in connection with its review of his sentence. *See* note 10 *supra*. In its opinion in *Brown*, the Florida court admitted requesting and receiving such material in some cases. The court did not specifically deny that it considered this information for some purpose, and the logical implication of its comment that it *obtained* nonrecord material in order to comply with "newly-articulated procedural standards" is that it also *used* the material for that purpose. Although the Florida court's opinion is ambiguous, it raises sufficient indicia that the court considered nonrecord material in reviewing capital sentences to negate any presumption to the contrary. Moreover, the material proffered by petitioner, which the district court should have admitted, together with the *Brown* opinion, in my view is sufficient to raise a contrary presumption: that petitioner's rights under *Gardner* were violated. Hence, only if the state can demonstrate that nonrecord information was not requested, received, or used by the state court in connection with Ford's case should relief be denied. Otherwise petitioner is entitled to a new appellate review of his sentence by the Florida Supreme Court with full disclosure of the materials it will consider.

II.

Unconstitutional Limitation of Mitigating Circumstances

A. *Waiver*

Ford contends the trial court's instructions to the jury on aggravating and mitigating factors violated his right under *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), to have the sentencer consider nonstatutory mitigating evidence concerning his character and the circumstances of his offense. The majority rejects this challenge purportedly on the ground that petitioner committed procedural default by failing to object to the instructions at trial and on direct appeal and because he has not established prejudice—the second component of the waiver exception recognized in *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). In reaching this conclusion, the majority confuses the issue of prejudice with the determination whether the challenged instruction was erroneous and hence decides both the procedural issue and the merits of appellant's claim. I disagree with the majority's analysis and resolution of both the waiver and substantive issues. Before discussing my disagreements with the majority, however, I will briefly state the bases for my conclusion that petitioner has established cause for his procedural default, which is the first required element of the *Sykes* exception to waiver.

1. *Cause*

In *Sykes*, the Supreme Court adopted the "cause and prejudice" exception to the waiver rule [16] but left for later cases the task of more specifically defining that standard. *Wainwright v. Sykes*, 433 U.S. at 90–91, 97 S.Ct. at 2508–09.[17] In the recent decision of *Engle v. Isaac*, — U.S. —, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982), the Court resumed the analysis left incomplete in *Sykes* and gave more "precise content"

16. The cause and prejudice standard was first enunciated in *Davis v. United States*, 411 U.S. 233, 93 S.Ct. 1577, 36 L.Ed.2d 216 (1973), in which it was applied to bar a challenge to the makeup of a federal grand jury asserted for the first time on collateral attack. In *Francis v. Henderson*, 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976), the Supreme Court extended the cause and prejudice standard to bar a similar challenge to a state's grand-jury composition. *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), which applied the standard in a case challenging admission of inculpatory statements, was the first case to state that the standard is a generally applicable limitation on federal habeas review where defendants fail to comply with states' contemporaneous objection rules.

17. In *Sykes* the respondent had "advanced no explanation whatever for his failure to object at trial" thus precluding a finding of cause, and the Court found that evidence at respondent's trial other than the allegedly unconstitutional evidence "negate[d] any possibility of actual prejudice." *Wainwright v. Sykes*, 433 U.S. at 91, 97 S.Ct. at 2509.

to the term "cause." In *Engle*, the Court addressed an assertion of "cause" similar to that raised by Ford. The defendants in *Engle*, challenging jury instructions as impermissibly shifting the burden of proof, asserted as "cause" for their failure to object to the instructions at trial that certain cases addressing the constitutionality of burden-shifting instructions had not been decided until after their trials and that therefore they could not have known at the time of trial that their constitutional rights were being violated. The Court did "not decide whether the novelty of a constitutional claim ever establishes cause for a failure to object."[18] It rejected the defendants' argument, however, because although some of the Court's relevant cases had postdated defendants' trials, the decision in *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), which "laid the basis for their constitutional claim," had preceded all of their trials by at least four and one-half years. In the years between *Winship* and defendants' trials, many defendants had relied on that case to challenge burden-of-proof rules, and numerous courts had upheld such claims. The Court concluded that in light of this substantial post-*Winship* litigation, "we cannot say that respondents lacked the tools to construct their constitutional claim." *Engle v. Isaac*, — U.S. — at —, 102 S.Ct. at 1574, 71 L.Ed.2d at 804.

Ford argues his failure to challenge the mitigating circumstances instruction at this sentencing hearing is justified by "cause" under *Sykes*. He bases this argument on the fact that the *Lockett* decision on which his constitutional challenge is founded was not decided until four years after his trial.[19] Under the analysis developed in *Engle* we must consider whether, even in the absence of the specific holding of *Lockett* entitling capital defendants to sentencer consideration of nonstatutory mitigating evidence, there were sufficient precedential tools available at the time of petitioner's trial on which he reasonably could have constructed his eighth amendment claim.

At the district court habeas hearing, the state urged that petitioner had committed procedural default by failing to object to the instructions at trial or to raise the issue on direct appeal. The district judge, although stating *Wainwright v. Sykes* controlled, without further elaboration proceeded to rule on the merits of the claim. This can be interpreted as an implicit find-

18. Prior to the Supreme Court decision in *Engle*, two circuits had addressed whether unforeseeability of a change in constitutional law occurring after trial may constitute cause under *Sykes*. In *Cole v. Stevenson*, 620 F.2d 1055 (4th Cir.) (en banc), *cert. denied*, 449 U.S. 1004, 101 S.Ct. 545, 66 L.Ed.2d 301 (1980), the Fourth Circuit held that a change in the constitutional law governing burden of proof did not constitute cause under *Sykes* for failure to raise a constitutional objection to burden-of-proof instructions in accordance with state procedural requirements. In *Isaac v. Engle*, 646 F.2d 1129 (6th Cir.1980) (en banc), *rev'd.* — U.S. —, 102 S.Ct. 1558, 71 L.Ed. 783 (1982), the Sixth Circuit reached the opposite conclusion. The only former Fifth Circuit case addressing whether a change in law constitutes cause is *Dumont v. Estelle*, 513 F.2d 793 (5th Cir.1975). (Although *Dumont* preceded the Supreme Court decision in *Sykes*, it applied the waiver standard on the basis of *Davis v. United States*, 411 U.S. 233, 93 S.Ct. 1577, 36 L.Ed.2d 216 (1973). *See* note 17 *supra*.) *Dumont* held that unawareness of constitutional precedent supporting an assertion of error is not cause for failure to raise such error in the state courts where the defendant seeks through his collateral challenge to establish the doctrine vindicating the constitutional right he claims. *Dumont* did not "present an appropriate context for determining the circumstances, if any, under which the supervening declaration of a right not previously known to exist might warrant relief from a [ ] procedural waiver . . ." *Dumont v. Estelle*, 513 F.2d at 800.

The Supreme Court, in reversing the *Engle* decision, did not resolve when unforeseeability of a post-trial constitutional development is sufficient cause to justify a procedural default because it found the development at issue was foreseeable. *See Engle v. Isaac*, — U.S. at —, 102 S.Ct. at 1572–75, 71 L.Ed.2d at 802–04. The Court noted, however, that it "might hesitate to adopt a rule that would require trial counsel either to exercise extraordinary vision or to object to every aspect of the proceedings in the hope that some aspect might mask a latent constitutional claim." *Id.* — U.S. at —, 102 S.Ct. at 1572, 71 L.Ed.2d at 802.

19. Appellant's trial took place in December 1974. The Supreme Court decided *Lockett* in December 1978.

ing that the cause and prejudice standard was satisfied.[19a]

The constitutional status of the death penalty has undergone substantial evolution in the last decade, beginning with *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). *Furman* signaled an important change in the law governing sentencing in capital cases.[20] In *Furman*, a majority of the Court reversed a death sentence imposed under a discretionary sentencing statute that provided no standards for determining whether a defendant would be sentenced to life imprisonment or death. The five members of the *Furman* majority issued separate opinions all concurring in the per curiam holding but each stating different reasoning. As noted subsequently by Chief Justice Burger in *Lockett v. Ohio*, 438 U.S. 586, 599–600, 98 S.Ct. 2954, 2961–62, 57 L.Ed.2d 973 (1978):

> Predictably, the variety of opinions supporting the judgment in Furman engendered confusion as to what was required in order to impose the death penalty in accord with the Eighth Amendment. Some States responded to what was thought to be the command of Furman by adopting mandatory death penalties for a limited category of specific crimes thus eliminating all discretion from the sentencing process in capital cases. Other States attempted to continue the practice of individually assessing the culpability of each individual defendant convicted of a capital offense and, at the same time, to comply with Furman, by providing standards to guide the sentencing decision.

In a series of cases decided in 1976 the Supreme Court substantially clarified *Furman*. Addressing the constitutionality of five states' post-*Furman* capital-sentencing statutes, the Court upheld those statutes that provided for individualized sentencing but channelled sentencer discretion by means of legislatively defined sentencing criteria, *see Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) (opinion of Powell, Stewart & Stevens, JJ.); *id.* at 260–61, 96 S.Ct. at 2970 (White & Rehnquist, JJ. & Burger, C.J., concurring); *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (opinion of Powell, Stewart & Stevens, JJ.); *id.* at 220–22, 96 S.Ct. at 2947–48 (White & Rehnquist, JJ. & Burger, C.J., concurring); *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976) (opinion of Powell, Stewart & Stevens, JJ., concurring); *id.* at 279, 96 S.Ct. at 2959 (White & Rehnquist, JJ. & Burger, C.J., concurring), and invalidated those that eliminated sentencer discretion entirely by making the death penalty mandatory in certain classes of cases, *see Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); and *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976). Although the opinions in *Furman* had focused on limiting the discretion of judges and jurors deciding whether to impose the death penalty, *see Furman v. Georgia*, 408 U.S. at 248–49 & n.

19a. In his separate concurrence and dissent Judge Tjoflat states that because "[p]etitioner never introduced any evidence, other than the record of the state court prosecution, to prove cause before the district court . . . it cannot be seriously contended that the trial court erred in holding that *Sykes* bars petitioner's claim." (Tjoflat, J., concurring and dissenting at 828). The district judge's findings of fact and conclusions of law reveal that he did not hold that petitioner's claim was barred by *Sykes*. To the contrary, he stated that "*Wainwright v. Sykes* controls" and then directly proceeded to the merits of petitioner's challenges to the sentencing phase instructions and rejected them *on the merits*. Findings of Fact and Conclusions of Law at 4, Record Excerpts at 113–18. While the district judge did not give highly individualized consideration to each of the subparts of the petitioner's claim raised in the habeas petition under the general heading "E. *Sentencing Phase Instructions to the Jury: Permitting the Arbitrary, Unguided Imposition of the Death Penalty*," I construe his rejection on the merits as applying to all aspects of the claim, including the *Lockett* claim. *See* Record Excerpts 113–18.

20. *Lockett v. Ohio*, 438 U.S. at 598, 98 S.Ct. at 2961. *See id.* at 597–99, 98 S.Ct. at 2960–62; Comment, *First Degree Murder Statutes and Capital Sentencing Procedures: An Analysis and Comparison of Statutory Systems for the Imposition of the Death Penalty in Georgia, Florida, Texas, and Louisiana*, 24 Loyola L.Rev. 709, 710–15 (1978).

11, 253–57, 92 S.Ct. at 2731 & n. 11, 2733–36 (Douglas, J., concurring); *id.* at 309–10, 92 S.Ct. at 2762 (Stewart, J., concurring); *id.* at 313–14, 92 S.Ct. at 2764 (White, J., concurring); *id.* at 365, 92 S.Ct. at 2790 (Marshall, J., concurring); *see also id.* at 398–99, 92 S.Ct. at 2808–09 (Burger, C.J., dissenting), the 1976 cases rejected an interpretation of *Furman* as rejecting all discretion in sentencing and reaffirmed the practice of individualized decisionmaking at the sentencing stage. *See Woodson v. North Carolina*, 428 U.S. at 303–05, 96 S.Ct. at 2990–91 (plurality opinion); *Roberts v. Louisiana*, 428 U.S. at 333–36, 96 S.Ct. at 3006–3007 (plurality opinion). In *Lockett v. Ohio*, *supra*, the Court further extended the requirement of individualized sentencing, establishing a constitutional requirement in capital cases that the sentencing authority consider all mitigating evidence proffered by the defendant relating to his character, record, and the circumstances of the particular offense.

Lockett, which had its roots in the *Woodson* and *Roberts* cases, unambiguously states that the Constitution compels the sentencer to consider all relevant mitigating evidence proffered by the defendant. That rule was in no way foreshadowed by *Furman*, however, which is the only one of the Supreme Court's contemporary death-penalty cases that had been decided at the time of petitioner's trial.[21] Because *Furman* was a major reversal of the principles articulated in previous cases challenging the death penalty and because no two of the concurring justices agreed on a rationale for the ruling in that case, the state of the constitutional law governing capital sentencing at the time of petitioner's trial can only be characterized as one of uncertainty and confusion. More importantly, the focus of the concurring opinions in *Furman* and the one aspect of its holding as to which everyone agreed was its condemnation of unlimited discretion in capital sentencing.[22] Probably the most logical, albeit incorrect, inference to be drawn from this unifying theme in the *Furman* opinions was that the decision required sentencers' consideration of both aggravating *and mitigating* evidence in capital cases to be based on narrowly defined statutory criteria.[23] The subsequent contrary holding of the Supreme Court in *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) does not undermine this assessment of the state of the law before that case was decided, even the plurality in *Lockett* recognized its decision was not foreshadowed by *Furman*. *See* note 23 *supra*. *See also Lockett v. Ohio*, 438 U.S. at 622, 98 S.Ct. at 2973 (White, J., concurring in part and dissenting in part) (Court in *Lockett* has "completed [an] about-face since *Furman v. Georgia*"); *id.* at 628–29, 631–32, 98 S.Ct. at 2973–74, 2975 (Rehnquist, J., concurring in part and dissenting in part) ("it can scarcely be maintained that today's decision is the logical application of a coherent doctrine first espoused by the opinions leading to the Court's judgment in Furman"); Murchison, *Toward a Perspective on the Death Penalty Cases*, 27 Emory L.J. 469, 545 (1978); Recent Development, *New Direction for*

21. The 1976 cases were the first decisions by the Supreme Court interpreting *Furman*. Appellant's trial preceded these decisions by two years.

22. Hertz & Weisberg, *In Mitigation of the Penalty of Death*: Lockett v. Ohio *and the Capital Defendant's Right to Consideration of Mitigating Circumstances*, 69 Calif.L.Rev. 317, 319 & nn. 7–8 (1981); Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 Harv.L.Rev. 1690, 1690–91, 1692–99 (1974).

23. Indeed, the provisions of the Ohio death penalty statute invalidated in *Lockett* as unconstitutionally limiting consideration of mitigating factors were enacted in direct response to *Furman*. As the Supreme Court noted, the Ohio legislature was debating death penalty legislation that would have permitted broader consideration of mitigating evidence at the time of the *Furman* adjudication. *Lockett v. Ohio*, 438 U.S. at 599 n. 7, 98 S.Ct. at 2962 n. 7. Once *Furman* was decided Ohio's legislators, "*[c]onfronted with what reasonably would have appeared to be the questionable constitutionality of permitting discretionary weighing of mitigating factors after Furman*," amended the pending legislation to restrict consideration of mitigating criteria from "any circumstance 'tending to mitigate the offense' " to three specific statutory mitigating circumstances. *Id.* (emphasis added).

Capital Sentencing or an About-Face for the Supreme Court?—Lockett v. Ohio, 16 Am.Crim.L.Rev. 317, 318, 328–30 & n. 148 (1979); *The Supreme Court, 1977 Term*, 92 Harv.L.Rev. 57, 99–100, 105–08 (1978); Recent Cases, *Sentencer Must Have Some Discretion in Imposing Capital Punishment: Another Retreat from* Furman v. Georgia, 44 Mo.L.Rev. 359, 365 (1979).[24] Nor, for that matter, was the *Lockett* holding anticipated by decisions of the Florida Supreme Court rendered prior to appellant's trial. Although the Florida Legislature's enactment in 1972 of a new capital sentencing statute went far in clarifying the meaning of *Furman*, at least as that decision was to be interpreted under Florida law,[25] the statute itself was barely a year old at the time of appellant's trial, and few cases had yet interpreted it or considered its constitutionality. If one can glean from the law existing at the time of appellant's trial any suggestion as to the scope of admissible mitigating evidence, it is that the Florida statute limited such evidence to that relevant to the enumerated mitigating factors.[26] Indeed the Florida Supreme Court's opinion affirming appellant's sentence re-

24. In addition to post-*Lockett* commentary such as that cited in the text, pre-*Lockett* analyses of the impact of *Furman* reflect an interpretation that would preclude the wide discretion in consideration of mitigating factors subsequently held to be required in *Lockett*. *See, e.g.*, Note, *supra* note 23, at 1702, 1703–04, 1707; Note, Furman *to* Gregg*: The Judicial and Legislative History*, 22 How.L.J. 53, 91–93 (1979) (article completed before *Lockett* though published thereafter).

25. Prior to *Furman*, Florida's death penalty statutes provided that defendants convicted of capital felonies would be punished by death unless the verdict included a recommendation of mercy concurred in by a majority of the jury. *See* Fla.Stat.Ann. § 921.141 Note (West 1973); *Dobbert v. Florida*, 432 U.S. 282, 288 & n. 3, 97 S.Ct. 2290, 2296 & n. 3, 53 L.Ed.2d 344 (1977). The recommendation of leniency was held within the exclusive province of the jury to be determined on the facts of the particular case, *Whitney v. Cochran*, 152 So.2d 727 (Fla.), *cert. denied*, 375 U.S. 888, 84 S.Ct. 166, 11 L.Ed.2d 118 (1963), and the jury decision, whether it recommended mercy or not, was binding on the trial judge. *State v. Miller*, 231 So.2d 260 (1970). The statutes provided no guidance concerning what evidence could be considered by the jury nor otherwise indicated in what circumstances a recommendation of mercy would be appropriate. *Cf. North v. State*, 65 So.2d 77, 100 (Fla.1952) (en banc), *affirmed per curiam*, 346 U.S. 932, 74 S.Ct. 322, 98 L.Ed. 423 (1954) (jury may recommend mercy when any extenuating facts or circumstances appeal to them as justifying such recommendation).

Shortly after *Furman* was decided, the Florida Supreme Court held these statutes unconstitutional under *Furman*. *Donaldson v. Sack*, 265 So.2d 499 (Fla.1972). The new Florida death penalty statute enacted in late 1972 set forth procedures under which the jury was to make its (now advisory) sentence and specific aggravating and mitigating criteria it could consider in sentencing. *See* Fla.Stat.Ann. § 775.082 (West 1976); *id.* § 921.141 (West 1973 & Supp.1982). It thus appears that the Florida Legislature read *Furman* as requiring standards or guidelines to confine the jury's discretion in capital sentencing. *See also Proffitt v. Florida*, 428 U.S. at 247–53, 96 S.Ct. at 2964–2967 (describing how Florida procedures meet constitutional deficiencies identified in *Furman*).

26. The first case considering the constitutionality of the new Florida statute was decided prior to Proffitt's trial. *State v. Dixon*, 283 So.2d 1 (1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1951, 40 L.Ed.2d 295 (1974). The majority interpreted *Furman* as not abolishing discretion in capital sentencing entirely but as concerned with "the quality of discretion and the manner in which it [is] applied." *State v. Dixon*, 283 So.2d at 6. The opinion discusses the specific provisions of the new Florida death penalty statute and the extent to which they control sentencing discretion but does not expressly state whether the state's mitigating circumstances provision is an exclusive list of the factors juries may consider in mitigation. The opinion's focus on the issue of control over sentencer discretion, however, coupled with its statement that "the propounding of aggravating and mitigating circumstances" is the "most important safeguard" the statute employs to restrain and guide such discretion, *id.* at 8–9, would have supported an interpretation of § 921.141 as limiting sentencer consideration of both aggravating and mitigating circumstances to the factors expressly described in the statute. The dissenting opinion of Justice Ervin, which argues that the statute allows the jury *too much* discretion to satisfy the dictates of *Furman*, *see id.* at 13–14 (Ervin, J., dissenting), expressly interprets the statute to limit the aggravating and mitigating circumstances judges and juries may consider to those enumerated in the statute. *Id.* at 17.

In *Cooper v. State*, 336 So.2d 1133, 1139 (1976), the Florida Supreme Court strongly suggested that the only factors relevant to sen-

flects the view that the sentencer's role is limited by the statutory criteria.[27]

In short, review of the case law existing at the time of Ford's trial leads to the inescapable conclusion not only that the *Lockett* decision was not presaged by the precedents but that a rule contrary to that eventually established in *Lockett* was strongly suggested by those decisions. Indeed, in 1974 counsel would have to have been blessed with "extraordinary vision" to have anticipated that the Supreme Court would establish the broad right to sentencer consideration of mitigating evidence sanctioned in *Lockett*. *Engle* indicates that counsel is not expected to possess such prophetic powers.[28] Because at the time of Ford's trial the "tools to construct [his] constitutional claim" were unavailable, see *Engle v. Isaac*, ---- U.S. at ----, 102 S.Ct. at 1575, 71 L.Ed.2d at 804, his failure to object to the mitigating circumstances instructions at the sentencing hearing was justified by cause within the meaning of *Wainwright v. Sykes*, *supra*. Further, as established in *Lockett* and discussed *infra* under 'Prejudice,' the preclusion of consideration of mitigating evidence "render[s] the [sentencing proceeding] fundamentally unfair." *Engle v. Isaac*, ---- U.S. at ----, 102 S.Ct. at 1573, 71 L.Ed. at 802.

2. *Prejudice*

The majority holds that Ford was not prejudiced by the jury instructions on mitigating circumstances. It states four bases for this conclusion. Three of these bases concern whether the instruction operated to preclude the jury from considering nonstatutory mitigating evidence and thus directly address the merits of petitioner's claim. To the extent the majority subsumes its analysis of the merits within its discussion of prejudice, it confuses two issues that should be treated separately. The notion of prejudice under the *Sykes* exception to waiver refers to the harm, if any, stemming from a constitutional violation. Because prejudice is thus defined as a product of constitutional error, determining the existence of prejudice might seem to require a preliminary inquiry into whether the error asserted has been committed. Logical though this approach might seem, however, it is not the correct analysis. For prejudice, in this context, is a component of the procedural question whether a habeas petitioner has waived his right to raise a constitutional issue in federal court. As such, prejudice is an issue that, along with the other components of the waiver analysis, must be determined *prerequisite* to deciding the merits of the substantive constitutional claim. If the federal court determines that the petitioner has waived his claim and either the cause or prejudice element of the exception to waiver is lacking, it must, in the interests of finality and deference to the state courts,

tencing under the Florida scheme are the *statutory* aggravating and mitigating circumstances. This holding was followed until, after the Supreme Court's decision in *Lockett*, the Florida court, reassessed its prior decisions and held that all mitigating evidence, statutory or nonstatutory, is admissible. *Songer v. State*, 365 So.2d 696, 700 (1978) (on rehearing). Although the *Songer* court attempted to reconcile *Cooper*, *see id.* at 700, it has recognized that *Cooper* was interpreted as precluding consideration of nonstatutory mitigating evidence. *See Perry v. State*, 395 So.2d 170, 174 (1980).

27. The opinion states:

> We have not overlooked the testimony favorable to appellant's character and prior behavior presented by the defense in mitigation during the sentencing trial. We do not pretend to know what motivated Alvin Bernard Ford to take the life of Dimitri Walter Ilyankoff. *Our duty under section 921.141, Florida Statutes (1975), as upheld by the United States Supreme Court in Proffitt v. State, supra, is to apply fairly the aggravating and mitigating circumstances duly enacted by the representatives of our citizenry to the facts of the capital cases which come before us.*

Ford v. State, 374 So.2d at 503 (emphasis added). A comparison of the Florida court's opinion in *Ford* with its opinion in *Songer v. State*, *supra* suggests that it considers the *Lockett* holding as narrowly confined to the question of admissibility of evidence and not as affecting the sentencers' or reviewing court's roles. *Washington v. Watkins*, 655 F.2d at 1375 and *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) repudiate this view. *See* text *infra* at 859–860.

28. *Engle v. Isaac*, ---- U.S. at ----, 102 S.Ct. at 1573, 71 L.Ed.2d at 802. *See note 18 supra.*

decline to adjudicate the merits of the constitutional claim. *Wainwright v. Sykes, supra.* In order to decide whether prejudice exists *before* deciding the merits of the claim in question, the court must *assume*, for purposes of resolving the prejudice issue, that constitutional error has been committed.[29] Approaching the prejudice issue from this perspective narrows the inquiry. The court need not resolve at this juncture whether the petitioner has shown a deprivation of constitutional right that has in turn caused him harm; rather the court should assume that a constitutional violation occurred and decide only whether such violation worked to "[the petitioner's] *actual* and substantial disadvantage," *United States v. Frady*, — U.S. —, —, 102 S.Ct. 1584, 1596, 71 L.Ed.2d 816, 832 (1982) (emphasis the Court's).[30] If the record reveals actual prejudice, then, and only then, should the court decide whether constitutional error occurred. As the Supreme Court has stated, this approach, which avoids deciding issues not fairly presented to the state courts, minimizes federal intrusion into the states' criminal adjudication systems and encourages state courts to take seriously their federal constitutional responsibilities. *Engle v. Isaac*, — U.S. at —, 102 S.Ct. at 1571, 1572, 71 L.Ed.2d at 800, 801.

Applying this approach to the instant case, we must assume for the moment that petitioner has established a constitutional violation, i.e., that the jury instructions reasonably could have been interpreted to limit consideration of mitigating evidence to that falling within the statutory mitigating factors. *See Washington v. Watkins*, 655 F.2d 1346, 1369 (5th Cir.1981). Assuming such error did occur, we must determine whether actual prejudice resulted.

The majority cites two factors in support of its conclusion that petitioner was not prejudiced by the mitigating circumstances instructions: (1) that the trial judge did not prevent the defense attorney from introducing evidence of nonstatutory mitigating factors, and (2) that defense counsel referred to such evidence in his closing argument.[31] In *Washington v. Watkins, supra*, the former Fifth Circuit rejected both of these factors as bases for holding a *Lockett*

29. In cases where the constitutional claim raised by the petitioner is obviously lacking in merit it may be appropriate to dispose of the substantive claim without first addressing waiver, particularly where the latter issue involves legal or factual questions that will be difficult to resolve. Because this approach undercuts the interests served by the waiver rule, however, it should be used sparingly.

30. In *United States v. Frady*, the petitioner had asserted that the state trial court violated his constitutional rights by instructing the jury incorrectly on malice. — U.S. at —, 102 S.Ct. at 1589, 1592, 71 L.Ed.2d at 824, 827. Frady had waived his claim by failing to raise it at trial or on direct appeal, *id.* at —, 102 S.Ct. at 1589, 71 L.Ed.2d at 824, and the Court declined to recognize an exception to the waiver rule under *Sykes* because it held petitioner had not established that he was actually prejudiced by the allegedly erroneous instruction. *Id.* at —, 102 S.Ct. at 1594, 71 L.Ed.2d at 830. The harm asserted by Frady—that the instructions relieved the government of its burden of proving malice and thus discouraged the jury from considering the lesser included offense of manslaughter—the Court found was neutralized by the "overwhelming" evidence of malice "coupled with Frady's utter failure to come forward with a colorable claim that he acted without malice." *Id.* at —, 102 S.Ct. at 1596, 1597, 71 L.Ed.2d at 832, 833. Moreover, the fact that the jury had convicted Frady not merely of second degree murder, which required only malice, but of first degree murder, which required a finding of premeditation and deliberation, showed that the jury's view of the facts was inconsistent with the mitigating factors that would have reduced the offense to manslaughter and with an absence of malice. *Id.* at — & n. 19, 102 S.Ct. at 1597-98 & n. 19, 71 L.Ed.2d at 833-34 & n. 19. *See also Wainwright v. Sykes*, 433 U.S. at 91, 97 S.Ct. at 2508 (other evidence of guilt negated possibility that admission of petitioner's inculpatory statement prejudiced him).

31. As noted above, the majority opinion presents four reasons for denying petitioner relief on the mitigating circumstances claim, three of which address the merits. I will address the majority's third reason, which pertains to the prejudice issue, at this juncture. The majority's first, second, and fourth bases will be treated in my discussion of the merits of petitioner's *Lockett* claim. *See* section II.B *infra*.

error harmless.[32] Addressing the contention that admission of nonstatutory mitigating evidence averted the harm from an erroneous mitigating circumstances instruction, the *Washington* court stated:

> [This argument] completely miss[es] the point of the Supreme Court's holding in *Lockett*. Sandra Lockett also introduced evidence of nonstatutory mitigating factors, and also argued their relevance to the sentencer. The fatal flaw in *Lockett* was not the exclusion of evidence relating to nonstatutory mitigating factors, but the limitation on the sentencer's consideration of that evidence except as it related to the statutory mitigating factors.

Id. at 1375. *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) further refutes the majority's position. In that case the defense attorney had introduced extensive nonstatutory mitigating evidence at the sentencing hearing. *See id.* at 108 & n.2, 102 S.Ct. at 873 & n.2, 71 L.Ed.2d at 6 & n.2. The trial judge in sentencing the defendant refused to consider that evidence, however, because he interpreted the sentencing statute as precluding consideration of nonstatutory factors. *Id.* at 108, 112–115, 102 S.Ct. at 873, 875–876, 71 L.Ed.2d at 7, 9–10. The Supreme Court reversed the sentence despite the fact that the Oklahoma statute permitted the defendant to present any mitigating evidence and that the judge had in fact admitted nonstatutory evidence. *Id.* at 106, 115 & n.10, 102 S.Ct. at 872, 876 & n.10, 71 L.Ed.2d at 6, 11 & n.10. The Court held that the trial court's refusal to consider the evidence violated *Lockett*, reasoning:

> Just as the state may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer, refuse to consider, as a matter of law, any relevant mitigating evidence. *In this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf.* The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

Id. at 113–115, 102 S.Ct. at 875–876, 71 L.Ed. at 10–11. The argument advanced by the majority that admission of nonstatutory evidence renders a *Lockett* violation harmless cannot be reconciled with the holdings in *Lockett*, *Eddings* and *Washington*.

The majority's reliance on the fact that defense counsel referred to the nonstatutory mitigating evidence in his arguments before the jury also conflicts with *Washington*.

> As the Supreme Court has noted in a related context, "arguments of counsel cannot substitute for instructions by the court." *Taylor v. Kentucky*, 436 U.S. 478, 488–89, 98 S.Ct. 1930, 1936–37, 56 L.Ed.2d 468 (1978) (concluding that trial court's omission of instruction on presumption of innocence was not remedied by defense counsel's explanation of the presumption in opening and closing argument). *Only an instruction from the trial court can invest a particular concept—here the jury's ability to consider nonstatutory mitigating factors—with the authority of the court.* *See id.* at 489, 98 S.Ct. at 1936–37. Indeed, were a jury to consider nonstatutory mitigating factors despite instructions by the court to the effect that it was duty-bound to consider only the two statutory mitigating circumstances, it would be acting "lawlessly," *see Woodson v. North Carolina*, 428 U.S. at 303, 96 S.Ct. at 2990 (opinion of Stewart, Powell, and Stevens). "There is an element of capriciousness in making the jurors' power to avoid the death penalty dependent on their willingness to accept [an] invitation to disregard the trial

32. *Washington* was decided by a Unit A panel of the former Fifth Circuit on September 14, 1981, prior to the division of that Circuit into the new Fifth and Eleventh Circuits. Thus the decision in *Washington* is binding on the Eleventh Circuit until expressly overruled by the en banc court. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981) (en banc). *Compare id. with Stein v. Reynolds Securities, Inc.*, 667 F.2d 33, 34 (11th Cir.1981) (decisions by Unit A panels of former Fifth Circuit after October 1, 1981 not binding on Eleventh Circuit).

judge's instructions." *Roberts v. Louisiana*, 428 U.S. 325, 335, 96 S.Ct. 3001, 3007, 49 L.Ed.2d 974 (1976) (opinion of Stewart, Powell, and Stevens).

Washington v. Watkins, 655 F.2d at 1375 (emphasis added). *See also Bell v. Ohio*, 438 U.S. 637, 641–43, 98 S.Ct. 2977, 2980–81, 57 L.Ed.2d 1010 (1978) (reversing death sentence even though defendant had argued nonstatutory mitigating factors justified penalty less than death where sentencing judges believed they were limited to statutory mitigating factors).

Lastly, no contention can be made that petitioner failed to present any significant nonstatutory mitigating evidence. Several witnesses testified on his behalf at the sentencing hearing. Ford's mother testified that his father had been a belligerent alcoholic during his childhood. She described petitioner's efforts, as a boy, to assume paternal responsibilities toward his younger siblings, including working during high school and after graduation to provide financial support for the family. A psychiatrist testified that Ford was bright and an overachiever but that he suffered from a type of brain damage known as Dyslexia, which results in a difficulty working with numbers. The psychiatrist described Ford's generally successful endeavors in his employment, which were subsequently thwarted when a promotion placed him in a position requiring mathematical computations. In the psychiatrist's view, Ford's actions in committing the robbery and murder stemmed from intense depression and frustration related to his disability rather than from a lack of moral standards. The psychiatrist stated that he believed petitioner could be rehabilitated. Because petitioner has demonstrated a substantial likelihood that the jury's misunderstanding of its responsibility to consider nonstatutory mitigating evidence critically affected its sentencing decision, I would hold that he has established actual prejudice under *Frady* and *Sykes* entitling him to an adjudication of the merits of his *Lockett* claim.

B. *Merits*

The majority states three reasons for holding that the mitigating circumstances instructions did not violate the rule of *Lockett*, none of which are persuasive. The majority recognizes that the standard of review governing constitutional challenges to jury instructions requires the court to determine "the way in which a reasonable juror *could* have interpreted the instruction." *Sandstrom v. Montana*, 442 U.S. 510, 514, 99 S.Ct. 2450, 2454, 61 L.Ed.2d 39 (1979) (emphasis added). Yet it relies on a "narrow parsing of language" [33]—the omission of the word "only" from the mitigating factors instruction, as compared with its inclusion in the aggravating factors instruction—in concluding that the jurors could not have believed they were limited to the statutory mitigating factors.[34] I am aware

33. *Washington v. Watkins*, 655 F.2d at 1370.

34. The jury instructions given by the trial judge at Ford's trial provided:

> Ladies and gentlemen, you have heard the evidence and argument of counsel necessary to enable you to render an advisory sentence to the Court as to whether the defendant should be sentenced to death or to life imprisonment.
>
> • • • • • •
>
> Your advisory sentence will have three parts.
>
> First: Whether sufficient aggravating circumstances exist to justify a sentence of death.
>
> Second: Whether sufficient mitigating circumstances exist which outweigh any aggravating circumstances to justify a sentence of life imprisonment rather than a sentence of death.
>
> Third: Based on those considerations whether the defendant should be sentenced to life imprisonment or to death.
>
> • • • • • •
>
> *As to aggravating circumstances, in considering whether sufficient aggravating circumstances exist to justify a sentence of death, you shall consider only the following:*
>
> A, whether the defendant was under sentence of imprisonment when the defendant committed the murder of which he has just been convicted by you;
>
> B, whether the defendant has previously been convicted of another capital felony or of a felony involving the use of or threat of violence to the person;
>
> C, whether in committing the murder of which the defendant has just been convicted by you, the defendant knowingly created a great risk of death to many persons;

that a plurality of the United States Supreme Court "interpreted the similar language of Florida's sentencing statute[35] as not precluding consideration of nonstatutory mitigating factors. *See Proffitt v. Florida*, 428 U.S. at 250 n.8, 96 S.Ct. at 2965 n. 8. *See also Lockett v. Ohio*, 438 U.S. at 606, 98 S.Ct. at 2965. The Florida Supreme Court, interpreting the same statutory provision, arrived at the opposite conclusion, however. *See Cooper v. State*, 336 So.2d 1133, 1139 & n.7 (Fla.1976), *cert. denied*, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977). *See also* notes 26-27 and accompanying text *supra*. If judges reasonably differed on the meaning of the provision, surely rational jurors likewise could have arrived at opposing interpretations. Moreover, even had the courts agreed on the meaning of the statute, the subtle nuances of statutory language on which judicial construction of legislative enactments so often turns are simply inadequate bases for discerning the possible understanding of jurors, who are less familiar with such legal niceties. Moreover, the former Fifth Circuit, in *Washington v. Watkins*, 655 F.2d at 1370 & nn.45-46, rejected an argument identical to that now espoused by the majority.[36] Although the majority purports to

D, whether the murder of which you have convicted the defendant was committed while the defendant was engaged in the commission of or attempt to commit, or flight after committing, or attempting to commit any robbery, rape, arson, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb;

E, whether the murder of which the defendant has just been convicted by you was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

F, whether the murder of which the defendant has just been convicted by you was committed for pecuniary gain;

G, whether the murder of which the defendant has just been convicted by you was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws;

H, whether the murder of which the defendant has just been convicted by you was especially heinous, atrocious, or cruel.

As to mitigating circumstances, in considering whether sufficient mitigating circumstances exist which outweigh any aggravating circumstances to justify a sentence of life imprisonment rather than a sentence of death, you shall consider the following:

A, whether the defendant has no significant history of prior criminal activity;

B, whether the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;

C, whether the victim was a participant in the defendant's conduct or consented to the act;

D, whether the defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor;

E, whether the defendant acted under extreme duress or under the substantial domination of another person;

F, whether the capacity of the defendant to appreciate the criminality of his conduct or to conform the defendant's conduct to the requirements of the law was substantially impaired;

G, the age of the defendant at the time of the crime.

35. The Florida statute provides that "Aggravating circumstances shall be limited to the following: [listing nine criteria]." Fla.Stat.Ann. § 921.141(5) (West Supp.1982), and that "Mitigating circumstances shall be the following: [listing seven criteria]." *Id.* § 921.141(6).

36. The instructions invalidated in *Washington* were as follows:

Members of the jury, as the court explained to you in the beginning of the trial, you have heard some evidence in aggravation put on by the State and you have heard evidence in mitigation put on by the defendant. You must in your sentencing find at least one item present of aggravation before you could impose the death penalty. If you find an item in aggravation present beyond a reasonable doubt, then you must consider any evidence in mitigation. And unless the evidence in mitigation could overcome the aggravation, of course, then you could return the death penalty.

You have found the defendant guilty of the crime of capital murder. You must now decide whether the defendant will be sentenced to death or to life imprisonment. In reaching your decision you must obviously consider the detailed circumstances of the offense for which the defendant was convicted and the defendant himself. To return the death penalty you must find that the aggravating circumstances, those which tend to warrant the death penalty, outweigh the mitigating circumstances, which are those which tend to warrant the lesser [sic] severe penalty. *Now consider only the following elements of aggravation in determining whether the death*

distinguish *Washington* on other grounds, its reasoning directly contravenes that of the *Washington* court.

The instructions given to the jury in this case were identical in most critical respects to those held invalid in *Washington v. Watkins*, 655 F.2d 1346 (5th Cir.1981). *See* notes 34 and 36 *supra*. The majority attempts to distinguish *Washington* on the basis of (1) the concluding reference by the trial judge in *Washington* to "the preceding elements of mitigation" and (2) the fact that the charge here listed all the statutory elements of mitigation whereas in *Washington* the judge listed only two of the statutory factors. The majority's reliance on the "preceding elements" language is misplaced. While it is true that the *Washington* court found that language "*further supported*" the inference that the enumerated factors were the sole factors to be considered by the jury, *id.* at 1370, the court concluded that "a reasonable juror might well infer" the listed factors were exclusive from the judge's use of the term "only" with respect to aggravating factors and from the immediately following "almost exactly parallel[ ]" language pertaining to mitigating circumstances. These two features of the judge's instruction alone would have supported such inference. *See id.* The "preceding elements" language present in *Washington* was supportive, but clearly not the decisive factor in the court's decision. *Id.* Nor does the trial judge's enumeration of all the statutory mitigating factors here in comparison with two listed in *Washington* provide a basis for distinguishing the two cases. We are concerned solely with whether the jury reasonably may have believed it was limited to considering mitigating evidence that fit within the statutorily enumerated factors. Whether the instructions set forth two, five, or a dozen statutory factors has no bearing on the jury's understanding of the defendant's right under *Lockett* to have it consider *nonstatutory* factors as well. At petitioner's sentencing hearing, as in Washington's and Lockett's, his attorney presented evidence concerning his character and background. "*[N]owhere* in the trial court's charge to the jury in the sentencing phase of [petitioner's] trial is there any explicit instruction that the jury was free to consider mitigating factors other than [those enumerated in the statute]," however. *Washington v. Watkins*, 655 F.2d at 1365. In *Washington*, the court found that no language in the charge rectified the absence of such an instruction by indicating to a reasonable jury that it was not limited to the statutory factors. The court reached this conclusion despite the trial judge's prefatory instruction that in reaching its decision the jury "must obviously consider the detailed circumstances of the offense for which the defendant was convicted and the defendant himself." *Id.* at 1369–70. Here there was lacking even the vague reference to the defendant's character and circumstances that was present in the *Washington* case. *See* note 34 *supra*. Thus, the instructions given in petitioner's sentencing hearing were even *less* likely to effectuate petitioner's right to have the jury consider evidence of his character and background than

penalty should be imposed: One, the capital murder was committed while the defendant Johnny Lewis Washington was engaged in the commission of the crime of robbery. Two, the defendant Johnny Lewis Washington committed this capital murder in an especially heinous, atrocious, or cruel manner. Those are your elements of aggravation.

You must unanimously find beyond a reasonable doubt that one or more of these existed in order to return the death penalty.

Now if one or more of those elements of aggravation is found to exist, then you must consider whether there are mitigating circumstances which outweigh the aggravating circumstances. *Now consider the following elements of mitigation in determining whether the death penalty should not be imposed*: One, that the defendant has no significant history of prior criminal activity and two, the defendant's age at the time of the capital murder.

If you unanimously find from the testimony that *one or more of the preceding elements of mitigation exist[s]*, then you must consider whether it outweighs the aggravating circumstances you previously found and you must return one of the following verdicts . . .

Washington v. Watkins, 655 F.2d at 1367–68. Compare above with note 34 *supra*.

the instructions invalidated in *Washington*.[37]

Finally, the majority ascribes great significance to the sentencing judge's finding that "[t]here are no mitigating circumstances existing—either statutory or otherwise—which outweigh any aggravating circumstances." Majority Opinion, *supra* at 813 (quoting Trial Court Findings on Sentencing, *reprinted in Ford v. State*, 374 So.2d 496, 500-02 n.1 (Fla.1979)). From this four-word phrase buried in the middle of the trial judge's detailed findings concerning the statutory mitigating and aggravating factors, the majority discerns not only an understanding on the part of the judge that nonstatutory mitigating evidence was relevant; the majority additionally "conclude[s]" from these words that the "judge's perception of what could be considered was *conveyed* to the jury." Majority Opinion, *supra* at 813 (emphasis added). With all due respect, I am unable to follow the majority's reasoning. It has always been my understanding that jury instructions, not trial court findings, serve the function of informing the jury of the law. For the reasons stated above, I do not believe the instructions in this case adequately informed the jury of its duty to consider nonstatutory mitigating evidence.

III.

Effect of Florida Supreme Court's Overruling of Aggravating Circumstances Found by Trial Court

Under Florida's capital sentencing statute, Fla.Stat.Ann. § 921.141 (West Supp. 1982), the judge's task in deciding whether to impose the death sentence entails several steps. The judge must first determine whether any of the statutory aggravating factors exist. *Id.* § 921.141(3), (5). He must "weigh" any aggravating factors found to exist and determine whether they are "sufficient" to impose the death penalty. *See id.* § 921.141(3). If he finds there are "sufficient aggravating factors," he must then inquire whether sufficient mitigating factors exist to outweigh the aggravating factors. *Id.*

In Ford's case, the trial judge found that all eight of the statutory aggravating factors[38] and none of the mitigating ones were

37. *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), applied in the context of a *Lockett*-based challenge to jury instructions, requires remand for resentencing if the trial court's instructions, taken in their entirety, could have led a reasonable juror to believe he could consider only the statutory mitigating circumstances. *See Washington v. Watkins*, 655 F.2d at 1369, 1370-71. Our inquiry is thus an objective one that focuses on the judge's instructions, and petitioner is not required to prove actual subjective misunderstanding of the law by the jurors. Although petitioner need not establish the actual state of mind of the jurors, evidence of their subjective understanding if available may support a conclusion that the instructions could reasonably have engendered their misunderstanding of the law. In this case, there is evidence in addition to the judge's instructions suggesting that the jurors actually considered themselves limited to the statutory mitigating circumstances. At the sentencing hearing, the judge read to the jury the charge concerning aggravating and mitigating circumstances. *See* note 34 *supra*. He did not give the jury a copy of that portion of the charge, however, because petitioner's attorney requested that he not do so. Shortly after the jury began its sentencing deliberations, the foreman submitted a request to the judge, which stated: "Judge Lee, we would like the list of charges regarding the definitions of aggravating circumstances and mitigating circumstances. Signed L. Patt, foreman." The defense attorney objected to the judge's reinstructing the jury on this point, but stated that if the court was to do so he would prefer the instruction be given orally rather than in writing. The judge informed the foreman that he would not provide the jury with a written charge but would again read it if the jury wished. The foreman then said to the other jurors: "You want to hear them again; what they consider the aggravating circumstances, *what they consider the mitigating circumstances*. They can't give us the things to take in. He will read them again for us; okay?" The judge then repeated the instruction previously given concerning aggravating and mitigating factors. The foreman's request for reinstruction concerning "what [the court] consider[s] the mitigating circumstances" indicates that he understood the circumstances enumerated by the court to be exclusive.

38. The current version of the statute lists nine aggravating factors. *See* Fla.Stat.Ann. § 921.141(5)(a)-(i) (West Supp.1982). The ninth aggravating factor was added by amendment in 1979. 1979 Fla.Laws, c. 79-353, § 1.

present and sentenced appellant to death. In his written findings the judge stated that aggravating factor (a) (defendant under sentence of imprisonment at time capital felony committed) was established because "[a]lthough the defendant was not imprisoned at the time of the murder, he did actually prevent arrest, prosecution and imprisonment for his other crime, at least temporarily, by the very murder for which he has been convicted." Trial Court's Findings on Sentence, *reprinted in Ford v. State*, 374 So.2d at 499–501 n.1. He specifically concluded that this aggravating circumstance "justifies a sentence of death." *Id.* The judge found that aggravating factor (b) (defendant previously convicted of another capital felony or felony involving violence to person) was present because

> [T]he defendant has been found guilty of breaking and entering to commit a felony, which would obviously involve the threat of violence to the person of anyone whom he might have confronted on the premises. Further, he has admitted the unlawful sale of narcotic drugs, which likewise involves a threat to the safety of members of the public.

Id. He concluded that this factor also "justifies the imposition of the sentence of death." *Id.* Of the six other aggravating factors the judge found, he did not specifically state that any one of them justified the death sentence.[39]

On appeal, the Florida Supreme Court held the trial court incorrectly found that aggravating factors (a) and (b) were established. *Ford v. State*, 374 So.2d at 502. The Florida Supreme Court stated only that the trial court had "erred," but its basis for so holding was obviously the fact that the evidence cited by the trial court in support of factors (a) and (b) did not conform to the terms of the statute. *See Peek v. State*, 395 So.2d 492, 499 (Fla.1980), *cert. denied*, 451 U.S. 964, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1981) (factor (a) requires that defendant have been incarcerated pursuant to prison sentence at time of offense); *Provence v. State*, 337 So.2d 783, 786 (Fla.1976) (factor (b) requires actual prior conviction). The Florida Supreme Court also rejected the trial court's findings that aggravating factors (d) (homicide committed while defendant engaged in attempted robbery) and (f) (homicide committed for pecuniary gain) were both present because the evidence used to support each was the same. The court held that these should have been viewed as a single aggravating factor. *Ford v. State*, 374 So.2d at 502–03. Although the Florida Supreme Court thus eliminated three of the aggravating factors relied on by the trial judge, it affirmed Ford's sentence on the ground that "five aggravating circumstances may properly be said to exist in this case" and, "there being no mitigating factors present death is presumed to be the appropriate penalty." *Id.* at 503.

As the majority notes, in *Henry v. Wainwright*, 661 F.2d 56 (5th Cir.1981), *vacated on other grounds*, — U.S. —, 102 S.Ct. 2922, 73 L.Ed.2d 1326 (1982), *judgment reinstated on remand*, 686 F.2d 311 (5th Cir. 1982)[40] and *Stephens v. Zant*, 631 F.2d 397

39. The concluding paragraph of the judge's findings indicates that the judge may have considered factor (h) (murder especially heinous, atrocious, and cruel) alone sufficient to support the death penalty. The finding pertaining specifically to that factor does not, in contrast to the findings on factors (a) and (b), state that it justifies the death sentence, however. Whether the judge would have imposed the death sentence absent his error in applying the statutory aggravating factors thus cannot be determined from the findings, and any attempt to answer that question would be sheer speculation.

40. In our first opinion in *Henry*, we indicated that the petitioner had failed to object at trial to the jury instructions that were the subject of his habeas challenge. *Henry v. Wainwright*, 661 F.2d at 57. The state argued that by violating Florida's contemporaneous objection rule Henry had waived his claim of error in the instructions under *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). The *Henry* court rejected this argument, however, on the ground that an objection would have been futile.

The Supreme Court vacated the former Fifth Circuit decision in *Henry* for reconsideration in light of *Engle v. Isaac*, — U.S. —, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). *Henry v. Wain-*

(5th Cir 1980), *reh. denied and modified*, 648 F.2d 446 (5th Cir.1981), *certified to Supreme Court of Georgia*, — U.S. —, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982),[41] the former Fifth Circuit held that resentencing was required where the sentencer had considered, respectively, nonstatutory aggravating factors and aggravating factors determined to be unconstitutionally vague. The majority distinguishes those cases, however, on the ground that the trial judge's errors in this case, which it characterizes as evidentiary insufficiency and multiple consideration of one aspect of Ford's offense, do not involve "consider[ation] [of] any extraneous or improper evidence." Majority Opinion, *supra* at 814. I disagree with the majority's position for two reasons.

First, the majority's premise—that the trial judge did not consider any improper evidence in deciding what sentence to impose—is incorrect. The evidence cited by the trial judge in support of aggravating factors (a) and (b) was irrelevant to those criteria. Moreover, at least some of that evidence was irrelevant to *any* of the aggravating circumstances enumerated in § 921.141(5).[42] The fact that such evidence may have been properly admitted at the guilt phase of trial did not give the judge license to consider it as a basis for imposing the death sentence. Only those factors spe-

wright, — U.S. —, 102 S.Ct. 2976, 73 L.Ed.2d 1361 (1982). In *Engle*, the Supreme Court held that "the futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial." *Engle v. Isaac*, — U.S. at —, 102 S.Ct. at 1572, 71 L.Ed.2d at 802. The Supreme Court's decision to vacate *Henry* presumably was based on the *Henry* court's articulation of a standard for cause that may conflict with that adopted in *Engle*.

After remand from the Supreme Court, this court clarified the earlier opinion and concluded that defendant had objected to the instructions at trial, but simply had not belabored the objection. *Henry v. Wainwright*, 686 F.2d 311 at 313. Alternatively, because the Florida courts "must have excused any default in order to reach the merits" of Henry's claim, any default was forgiven. *Id.* at 314. Thus, there was no waiver under *Engle* or *Wainwright v. Sykes*. Consequently, the panel reinstated the prior judgment, holding that consideration of nonstatutory aggravating circumstances rendered the sentence constitutionally infirm and mandated vacation of the sentence. *Henry v. Wainwright*, 686 F.2d 311 at 314.

The waiver issue involved in *Henry* is not present with respect to Ford's aggravating circumstances claims, which are aimed not at the jury instructions but rather at the trial judge's findings on aggravating circumstances. Obviously no objection to the findings could have been raised at trial because the judge did not make the findings until after the trial. On his direct appeal to the Florida Supreme Court, petitioner objected to the findings concerning aggravating circumstances, and that court ruled on the merits of such challenge.

41. The Supreme Court's order certifying the *Stephens* case to the state supreme court for clarification of the state law premises for that court's decision does not address the appropriateness of the relief ordered by the Fifth Circuit. The three dissenting justices were clearly of the view that resentencing was constitutionally required. *See Zant v. Stephens*, — U.S. —, —, 102 S.Ct. 1856, 1860, 72 L.Ed.2d 222, 228 (1982) (Marshall, J., joined by Brennan, J., dissenting), *id.* at —, 102 S.Ct. at 1864, 72 L.Ed.2d at 235 (Powell, J., dissenting). The Supreme Court has received an answer to its certification to the state supreme court, *Zant v. Stephens*, 250 Ga. 97, 297 S.E.2d 1 (1982), but has not yet issued a final decision in the case. Thus, the issue is still pending before the Court. Even more significant is the Court's recent grant of certiorari in *Barclay v. Florida*, 411 So.2d 1310 (Fla.1982), *cert. granted*, — U.S. —, 103 S.Ct. 340, 74 L.Ed.2d — (1982), which appears to present virtually the identical issue as is raised in this case. There, in addition to considering aggravating factors allegedly unsupported by the evidence, a nonstatutory aggravating circumstance was considered. Because in my opinion Ford's case cannot, on a principled basis, be distinguished from *Stephens*, or *Barclay*, the Supreme Court's decision in either of these cases will probably affect the outcome of this case. For this reason, decision of the aggravating circumstances issue should be deferred until the Supreme Court has decided the merits of *Stephens* and *Barclay*.

42. The evidence cited in support of factor (a), see text *supra* at 864, is relevant to, and indeed was relied on by the judge in support of, aggravating factor (e) (murder committed for purpose of avoiding lawful arrest or effecting escape from custody). Trial Court Findings on Sentence, *reprinted in Ford v. State*, 374 So.2d at 501-02 n. 1. The evidence cited in support of factor (b), however, particularly the defendant's "admi[ssion] [of] the unlawful sale of narcotics drugs," is irrelevant to any of the other statutory factors.

cifically delineated in the statute may be considered in the sentencing process, and reliance on information irrelevant to those factors, whether or not properly before the sentencer for other purposes, violates the defendant's right to channelled sentencer discretion under *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Nor does the trial judge's attempt to fit these square pegs of fact into the round holes of the statutory criteria rectify his error. His consideration of these facts was no less a departure from the legislative guidelines than the complete disregard for the limits imposed by the statutory factors committed by the sentencer in *Henry*.

Second, even if all the evidence considered by the trial judge in imposing sentence was relevant to some of the statutory aggravating criteria, the judge's reliance on an incorrect legal theory in determining petitioner's sentence renders the sentence invalid. The cases are legion that have reversed criminal convictions where the jury was permitted to consider an improper legal theory. Even where a general verdict renders impossible the determination whether the jury in fact relied on the improper theory, a conviction possibly predicated on such mistaken interpretation of the law will not stand. *Bachellar v. Maryland*, 397 U.S. 564, 570–71, 90 S.Ct. 1312, 1315–16, 25 L.Ed.2d 570 (1970); *Street v. New York*, 394 U.S. 576, 585–88, 89 S.Ct. 1354, 1362–64, 22 L.Ed.2d 572 (1969); *Yates v. United States*, 354 U.S. 298, 311–12, 77 S.Ct. 1064, 1072–73, 1 L.Ed.2d 1356 (1957); *Terminiello v. Chicago*, 337 U.S. 1, 6, 69 S.Ct. 894, 896, 93 L.Ed. 1131 (1949); *Cramer v. United States*, 325 U.S. 1, 36 n.45, 65 S.Ct. 918, 935 n.45, 89 L.Ed. 1441 (1945); *Ashcraft v. Tennessee*, 322 U.S. 143, 155–56, 64 S.Ct. 921, 927, 88 L.Ed. 1192 (1944); *Williams v. North Carolina*, 317 U.S. 287, 291–92, 63 S.Ct. 207, 209–10, 87 L.Ed. 279 (1942); *Stromberg v. California*, 283 U.S. 359, 369–70, 51 S.Ct. 532, 535–36, 75 L.Ed. 1117 (1931). Here there is no uncertainty. It is clear from the trial judge's findings that he based his sentence at least in part on (1) evidence that did not comprise two of the aggravating factors he cited and (2) two aggravating circumstances that were based on the same facts and were therefore cumulative. Had these factors constituted the sole aggravating circumstances found by the judge, there is little question that the sentence would have been invalid under both state and federal law.[43] Hence, the only remaining question is whether the judge's partial reliance on improper aggravating factors can be viewed as harmless in view of the five valid aggravating factors he found. The Florida Supreme Court answered this question in the affirmative, stating that where some aggravating factors and no mitigating factors[44] are found

43. The Florida Supreme Court has reversed death sentences in cases in which it has invalidated the only aggravating factor(s) found by the sentencing judge. *E.g., Perry v. State*, 395 So.2d 170, 172, 174–75 (Fla.1981); *Purdy v. State*, 343 So.2d 4 (Fla.1977). Moreover, it has reversed death sentences partially predicated on improper aggravating circumstances when any mitigating factors were established. *E.g., Gafford v. State*, 387 So.2d 333, 337 (Fla.1980); *Lewis v. State*, 377 So.2d 640, 646–47 (Fla. 1980); *Fleming v. State*, 374 So.2d 954, 957–59 (Fla.1979).

The United States Supreme Court has reversed a death sentence on federal constitutional grounds where the state supreme court rejected all three of the theories relied on by the sentencing jury in support of an aggravating factor. *Presnell v. Georgia*, 439 U.S. 14, 99 S.Ct. 235, 58 L.Ed.2d 207 (1978) (per curiam). The Court held the defendant's right to due process was violated by the state supreme court's affirmance of his sentence on the basis of a theory that the sentencing jury had not been instructed to consider. *Id.* at 16–17, 99 S.Ct. at 236–237. *See also Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (holding sentencer's application of "outrageously or wantonly vile, horrible and inhuman" aggravating factor to particular case unconstitutional and invalidating death sentence based solely on that factor).

44. An essential premise of the Majority's and the Florida court's harmless-error analysis—that there are no mitigating factors—cannot, in my view, be established in this case because the trial judge and jury erroneously believed they could not consider nonstatutory mitigating evidence. *See* Section II B, *supra*. In the following section of this opinion I will assume that no mitigating circumstances could have been established, however, because the outcome of petitioner's aggravating factors claim,

death is "presumed to be the appropriate penalty." This statement, which the majority adopts, is susceptible of either of two interpretations. Neither in my view provides a constitutional basis for affirming a sentence partly predicated on improper aggravating factors.

The state court's remark that where some aggravating and no mitigating factors are present "death is presumed appropriate" could be understood to mean that the initial sentencer *must* impose the death penalty if it finds any aggravating and no mitigating factors. An alternative interpretation is that the appellate court is engaging in a presumption, for *review* purposes, that when the initial sentencer has found some aggravating factors and no mitigating ones it would have imposed the death sentence even if it had not considered the erroneous aggravating factors. *See Zant v. Stephens*, — U.S. —, —, 102 S.Ct. 1856, 1859, 72 L.Ed.2d 222, 227 (1982). I would be hesitant to attribute to the Florida court the first interpretation of the statute, which would make the death penalty mandatory in all cases in which some aggravating and no mitigating factors are found. The statutory language does not support this interpretation. It requires both the advisory jury and the sentencing judge initially to determine "[w]hether *sufficient* aggravating circumstances exist as enumerated in subsection (5) [of the statute]." Fla.Stat.Ann. § 921.141(2), (3) (West Supp. 1982). Only after finding that there are "sufficient" aggravating factors are the jury and judge instructed to address mitigating factors. *Id.* The statutory language thus suggests that death is appropriate only where the sentencers make an individualized judgment that the aggravating factors they have identified are sufficiently grave to justify that punishment. Another reason I would not attribute this interpretation of the statute to the Florida Court is that the statute as so interpreted would pose significant constitutional questions. The Supreme Court has held that capital sentencing schemes may not, consistently with eighth amendment principles, eliminate all sentencer discretion by making the death sentence mandatory for certain statutorily defined categories of offenses. *See Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976). Moreover, the Court has recently reaffirmed the importance of individualized sentencing by holding that the scope of mitigating evidence a defendant may proffer on his own behalf may not be unduly curtailed by statute. *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). *See also Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). Making the death sentence mandatory in all cases where some aggravating and no mitigating factors are present would not curtail sentencer discretion to the same degree as the statutes condemned in *Woodson* and *Roberts*, nor in the same manner as the statute invalidated in *Lockett*. Nonetheless such a law would prevent sentencers from declining to impose the death sentence in many cases where the particular facts, though technically within the statutory aggravating criteria, do not in the sentencer's judgment present sufficient indicia of malice, dangerousness, or other evil to justify the ultimate punishment. Whether such a restriction on sentencer discretion is constitutional may soon be decided by the Supreme Court. *See Zant v. Stephens*, *supra*. I will not attempt to predict the holding of the Court on this issue. Suffice it to say that the constitutional difficulties presented by this interpretation of the Florida statute are significant enough that we should not attribute such interpretation to the state court without a clear statement to that effect on its part.[43] *Cf. id.* (certifying case

correctly analyzed, does not depend on the existence of mitigating circumstances.

43. The Florida cases do not make clear which of these two interpretations underlie the rule. The state cites *Elledge v. State*, 346 So.2d 998 (Fla.1977), as the seminal Florida Supreme Court case discussing the application of the harmless error rule to erroneously considered aggravating factors. The *Elledge* court reasoned that improper aggravating factors could have affected the initial sentencing decision

to Supreme Court of Georgia for description of state law premises of similar statement by Georgia court).

If the Florida court's statement is interpreted as a presumption to be applied at the review stage that death is appropriate whenever the sentencer has found some aggravating and no mitigating factors, such state law rule also suffers a constitutional infirmity. As I have already noted, see text *supra* at 848, meaningful appellate review is a constitutionally required element of capital sentencing schemes. Engaging in the presumption just described falls far short of the type of review that will ensure rationality and consistency in sentencing. Where a judge or jury disregards or misinterprets the procedures or criteria established by the state's sentencing scheme, the regularity and objectivity in sentencing that the statute is designed to accomplish is defeated. Once such an error has been made, however, there are different possible approaches to correcting it. As the former Fifth Circuit recognized in *Henry v. Wainwright*, *supra* and *Stephens v. Zant*, *supra*, not all such approaches meet the requirements of the eighth amendment. Superimposing on defective sentencing a review procedure under which the appellate court, having identified the sentencer's error, then speculates or presumes what the sentencer would have done had the error not been made compounds rather than resolves the problem and is clearly inconsistent with *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). The Supreme Court also has recognized the infirmity of such a review process. *Presnell v. Georgia*, 439 U.S. 14, 99 S.Ct. 235, 58 L.Ed.2d 207 (1978) (per curiam) (imposition of death sentence violated due process where state supreme court rejected jury's grounds for sentence but affirmed sentence on ground that evidence supported theory not relied on by jury); *Cole v. Arkansas*, 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644 (1948) (state supreme court's affirmance of convictions on basis of statutory provision other than that to which proof was directed at trial deprived defendant of due process). *Cf. Eddings v. Oklahoma*, 455 U.S. 104, 117–19, 102 S.Ct. 869, 877–79, 71 L.Ed.2d 1, 13–14 (1982) (O'Connor, J., concurring) (where it appears trial judge believed he could not consider mitigating evidence, Court will not speculate as to whether he did consider it but found it insufficient; "*Woodson* [*v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976)] and *Lockett* [*v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)] require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the court").

Presnell v. Georgia establishes that a fundamental element of due process of law is the right to be sentenced by the trial level trier of fact who has heard the proof. "'To conform to due process of law, petitioner[ ] [was] entitled to have the validity of [his] [sentence] appraised on consideration of the case as it was tried and as the issues were determined in the trial court.'" *Presnell*, 439 U.S. at 16, 99 S.Ct. at 236, quoting *Cole v. Arkansas*, 333 U.S. 196, 202, 68 S.Ct. 514, 517, 92 L.Ed. 644 (1948). Indeed, the law has appeared clear that "only the trier of fact may impose a death sentence." *Willis v. Balkcom*, 451 U.S. 926, 101 S.Ct. 2003, 68 L.Ed.2d 315 (1981) (Marshall, Brennan & Stewart, JJ., dissenting from denial of certiorari). If the trial court declines to im-

only if the sentencer found some mitigating factor(s). *Id.* at 1002–03. The court's suggestion that the "weighing process" takes place only if the sentencer finds both aggravating and mitigating factors, see *id.* at 1003, implies that the statute does not allow the sentencer to evaluate the sufficiency of aggravating factors in cases where it finds no mitigating factors. *But cf. Williams v. State*, 386 So.2d 538, 543 (Fla.1980) (reversing death sentence predicated partially on invalid aggravating factors despite presence of one valid aggravating factor and no mitigating factors because jury recommended life sentence). The court's holding in *Williams* indicates that the advisory jury may, consistently with the Florida sentencing statute, decline to impose the death penalty if it views the aggravating factors as insufficient to justify such sentence. *See id.* at 543. *See also Demps v. State*, 395 So.2d 501, 506 (Fla.1981) (trial judge may "tak[e] into consideration the quality of aggravating circumstances applicable to each defendant").

pose the death penalty, the appellate court constitutionally could not impose the death sentence on its own initiative on appeal. The same logic requires that the death penalty be affirmed only for the reasons on which the trial court relied in imposing the sentence. *Presnell v. Georgia*, 439 U.S. at 15–16, 99 S.Ct. at 235–36. Whether or not the appellate court perceives that the ultimate penalty could have been imposed on less than all the circumstances presented to the lower court, the appellate court is not empowered to impose the death sentence on the basis of those lesser circumstances. The crucial question in reviewing a death sentence when some of the circumstances relied on by the lower court are invalidated is not whether the trier of fact constitutionally *could have*, but whether it *would have* imposed the death penalty on the basis of those lesser circumstances. Because the question of what the trier of fact would have done can not be answered by an appellate body in any consistent and reliable manner but only through pure speculation, in these circumstances affirmance of the death penalty by the appellate court violates the reliability and consistency requirements of the eighth amendment. *See, e.g., Eddings v. Oklahoma*, 455 U.S. at 117–19, 102 S.Ct. at 877–879, 71 L.Ed.2d at 12, 13–14 (O'Connor, J., concurring); *Lockett v. Ohio*, 438 U.S. at 604, 98 S.Ct. at 2964 (plurality opinion); *Gardner v. Florida*, 430 U.S. at 359–60, 97 S.Ct. at 1205–06 (opinion of Powell, Stewart & Stevens, JJ.); *id.* at 363–64, 97 S.Ct. at 1207 (White, J., concurring); *Woodson v. North Carolina*, 428 U.S. at 305, 96 S.Ct. at 2991 (opinion of Powell, Stewart & Stevens, JJ.); *Gregg v. Georgia*, 428 U.S. at 188, 96 S.Ct. at 2932 (opinion of Powell, Stewart & Stevens, JJ.); *id.* at 207, 220–24, 96 S.Ct. at 2941, 2947–49 (White & Rehnquist, JJ. & Burger, C.J., concurring); *Jurek v. Texas*, 428 U.S. at 276, 96 S.Ct. at 2958 (opinion of Powell, Stewart & Stevens, JJ.); *id.* at 277, 278–79, 96 S.Ct. at 2958, 2959–60 (White & Rehnquist, JJ. & Burger, C.J., concurring); *Proffitt v. Florida*, 428 U.S. at 252–53, 258–59, 96 S.Ct. at 2966–67, 2969–70 (opinion of Powell, Stewart & Stevens, JJ.); *id.* at 260–61, 96 S.Ct. at 2970 (White & Rehnquist, JJ. & Burger, C.J., concurring); *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

When it is found on appellate review that any of the aggravating factors on which the trial court relied in initially imposing the death sentence are invalid, the appellate court has no method by which to determine whether those factors were the ones to tip the initial sentencer's decision in favor of the death penalty. Even when only one circumstance is invalidated on appeal a reviewing court is not equipped to judge the actual significance to a trial judge or jury of that one, now invalid, factor. To speculate as to the degree of significance violates not only the mandate of the eighth amendment as interpreted in *Furman* and its progeny but also the due process right actually to be sentenced by the trial level judge or jury. *Presnell v. Georgia*, 439 U.S. at 16, 99 S.Ct. at 236.

The posture of this case is identical to, and therefore poses the same problem raised by, *Henry* and *Stephens*. As the majority points out, the trial courts' errors with respect to aggravating factors in *Henry* and *Stephens* were different than those involved here. In my view the difference is not significant. *See* text *supra* at 865–866. Moreover, the decisions in *Henry* and *Stephens* to remand for resentencing were not predicated on the nature of the trial courts' errors. Rather, the courts in those cases were concerned with the procedural regularity in capital sentencing that *Furman* held is mandated by the eighth amendment. The Fifth Circuit's resolution of the *Henry* and *Stephens* cases was based directly on the requirement of *Furman* that juries' discretion in capital sentencing be guided by objective and *rationally reviewable* standards. In both of those cases the state appellate courts had found valid aggravating circumstances in addition to unconstitutional ones, and no mitigating factors were present. The Fifth Circuit refused to affirm the death sentences on the basis of the valid aggravating factors, however. It reasoned that even though the juries could rationally have recommended the death sen-

tence on the basis of the permissible factors they had considered, there was no way for the court retrospectively to determine whether they would in fact have done so had they been properly instructed. An attempt to second-guess the jury, in the court's view, was not the proper role of the reviewing court but was "the antithesis of the rational review of the jury's application of clear and objective standards contemplated by *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) and its progeny."[46]

By attempting to distinguish this case from *Henry* and *Stephens* the majority confuses the requirement of *Furman* that capital sentencing be structured by procedures and criteria that are rationally reviewable with the requirements of other cases imposing substantive constitutional limitations on such criteria.[47] I do not suggest that every question of statutory interpretation involving capital sentencing criteria necessarily implicates the Federal Constitution. On the contrary, it is the procedure here employed by the state court, and not its substantive decision, that in my view raises a constitutional issue.

The Supreme Court recently has granted certiorari in *Barclay v. Florida*, 411 So.2d 1310 (Fla.1982), *cert. granted*, — U.S. —, 103 S.Ct. 340, 74 L.Ed.2d — (1982), on the question of whether consideration of a nonstatutory aggravating circumstance and aggravating factors allegedly unsupported by the evidence requires resentencing. In my view this court should defer decision of petitioner's aggravating circumstances claim pending the Supreme Court decisions in *Stephens* and in *Barclay*. Barring a contrary ruling by the Court in these cases, I would hold that the rational review requirement of *Furman* compels resentencing in instances, such as this one, in which the sentencer has misapplied the state's capital sentencing criteria.

Conclusion

Petitioner's eighth and fourteenth amendment rights have been violated by the Florida Supreme Court's consideration of nonrecord information and the trial court's erroneous instructions on mitigating circumstances. The trial court's reliance on improper evidence and legal theories in support of aggravating circumstances also violated his constitutional rights and may compel resentencing. *See* note 41 *supra*. Ac-

46. *Henry v. Wainwright*, *supra*, 661 F.2d at 60 n. 8 (citing *Woodson v. North Carolina*, 428 U.S. 280, 303, 96 S.Ct. 2978, 2990, 49 L.Ed.2d 944 (1976)). The *Henry* panel rejected the reasoning of the Florida court that the sentence would be affirmed as long as no mitigating circumstances were found because "there is no danger that the unauthorized [aggravating] factor tipped the scale in favor of death." *Henry v. Wainwright*, 661 F.2d at 59. *Henry* held that the reviewing court's role in capital sentencing was not to second-guess the motives of the jury in recommending the death penalty:

> Guarding against the arbitrary and discriminatory imposition of the death penalty must not become simply a guessing game played by a reviewing court in which it tries to discern whether the nonstatutory aggravating factors exerted a decisive influence on the sentence determination. The guarantee against cruel and unusual punishment demands more.

Id. at 60.

Similarly, in *Stephens* the court held the sentence unconstitutional because it was "impossible for a reviewing court to determine satisfactorily that the verdict in this case was not decisively affected by an unconstitutional statutory aggravating circumstance." *Stephens v. Zant*, 631 F.2d at 406. The constitutional deficiency in the sentence was not only that "the jury's discretion here was not sufficiently channelled," but also "that the process in which the death penalty was imposed in this case was not 'rationally reviewable.'" *Id.* at 406. *See also id.* (as modified by 648 F.2d 446).

47. *E.g.*, *Enmund v. Florida*, — U.S. —, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) (eighth amendment prohibits imposition of death penalty on defendants who aid and abet felony during which murder occurs but do not themselves kill or intend that killing take place); *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (aggravating criterion that offense was "outrageously or wantonly vile, horrible, or inhuman" unconstitutional as applied to crime reflecting no more "depravity" of mind than that of anyone guilty of murder); *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (aggravating circumstances will not justify death sentence where such penalty is disproportionate to offense).

cordingly, subject only to the Supreme Court's decisions in *Stephens* and *Barclay*, I would remand this case to the district court with instructions to issue the writ of habeas corpus unless the state court grants petitioner a new sentencing proceeding followed by meaningful review in the state supreme court based solely on evidence in the record.

JOHNSON, Circuit Judge, concurring in part and dissenting in part:

[3, 6-15] While Judge Kravitch has analyzed and critiqued Sections I and III of the majority opinion in a most comprehensive manner, I write separately to emphasize the bases for my objections to these portions of the majority opinion.

The petition before us presents undenied allegations that the Florida Supreme Court considered nonrecord psychiatric, psychological, and post sentence reports on the direct appeal of petitioner's conviction and sentence. The Florida Supreme Court has admitted the practice but has attempted to justify its actions by drawing a fine distinction between capital sentence "review" as defined by state law and constitutionally required "supervisory standards" imposed by the United States Supreme Court. *Brown v. Wainwright*, 392 So.2d 1327, 1333 & n. 17 (Fla.), *cert. denied*, 454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981). In *Brown* the Florida court asserted that "nonrecord information we may have seen, even though never presented to or considered by the judge, the jury, or counsel, plays no role in capital sentence 'review.'" 392 So.2d at 1332-33. Yet at the same time the court, citing *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), stated that "[t]he 'tainted' information we are charged with reviewing was . . . in every instance obtained to deal with newly-articulated procedural standards." *Id.* at 1333 n. 17. These "procedural standards," the court admitted, ". . . are required to make the statute operate in a constitutional manner." *Id.* It is clear, therefore, from the *Brown* opinion that the Florida Supreme Court has considered nonrecord material on direct appeal in capital cases for the purpose of complying with requirements of the United States Constitution. The court's failure to make the appellants aware of the use of this information, and to afford them a reasonable opportunity to challenge or explain any portion of it, however, is a clear abrogation of its duty under the Constitution.

The majority simply cannot avoid the direct implication of *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), in which the Supreme Court invalidated a death sentence imposed in part on information contained in an undisclosed presentence report. A majority of the Justices in *Gardner* agreed that a trial court's reliance on unrevealed information clearly violates the constitutional standards required for capital sentencing. The plurality opinion concluded that "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." 430 U.S. at 358, 97 S.Ct. at 1204 (Stevens, J.). Thus, the Florida Supreme Court's practice of reviewing nonrecord materials on direct appeal runs afoul of the Due Process Clause—viewed either independently or as "the vehicle by which the strictures of the Eighth Amendment are triggered. . . ." *Id.* at 364, 97 S.Ct. at 1207 (White, J., concurring). The same conclusion applies to direct review of death sentences by the Florida Supreme Court.

Direct review of capital sentences to safeguard against arbitrary and capricious sentencing is an essential element in the constitutional imposition of the death sentence. *See, e.g., Gregg v. Georgia*, 428 U.S. 153, 198, 96 S.Ct. 2909, 2936, 49 L.Ed.2d 859 (1976) (plurality) (The provision for appellate review in the Georgia capital sentencing system serves as a check against the random or arbitrary imposition of the death penalty.); *Proffitt v. Florida*, 428 U.S. 242, 253, 96 S.Ct. 2960, 2967, 49 L.Ed.2d 913 (1976); *Jurek v. Texas*, 428 U.S. 262, 276, 96 S.Ct. 2950, 2958, 49 L.Ed.2d 929 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 303, 96 S.Ct. 2978, 2990, 49 L.Ed.2d 944 (1976); *Roberts v. Louisiana*, 428 U.S. 325,

335 n. 11, 96 S.Ct. 3001, 3007 n. 11, 49 L.Ed.2d 974 (plurality) (striking down the death statute in part because it did not provide for "judicial review to safeguard against capricious sentencing determinations"). Direct capital sentence review by the Florida Supreme Court is even more integral to the capital sentencing process of Florida than it is in other states. In upholding the facial constitutionality of the Florida death penalty in *Proffitt*, the Supreme Court emphasized the Florida Supreme Court's role as independent evaluator of the evidence in a system that attempted "to assure that the death penalty will not be imposed in an arbitrary or capricious manner." 428 U.S. at 252-53, 96 S.Ct. at 2966. "[T]o the extent that any risk [of arbitrary or capricious sentencing] exists, it is minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida 'to determine independently whether the imposition of the ultimate penalty is warranted.'" 428 U.S. at 253, 96 S.Ct. at 2967 (quoting *Songer v. State*, 322 So.2d 481, 484 (Fla.1975), *vacated on other grounds*, 430 U.S. 952, 97 S.Ct. 1594, 51 L.Ed.2d 801 (1977)). In performing its review function the Florida Supreme Court "evaluate[s] anew the aggravating and mitigating circumstances of the case to determine whether the punishment is appropriate." *Harvard v. State*, 375 So.2d 833, 834 (Fla.1977), *cert. denied*, 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979).

> The statute contemplates that the trial jury, the trial judge *and this Court* will exercise reasoned judgment as to what factual situations require the imposition of death and which factual situations can be satisfied by life imprisonment in light of the totality of the circumstances present in the evidence. Certain factual situations may warrant the infliction of capital punishment, but, nevertheless, would not prevent either the trial jury, the trial judge, or *this Court* from exercising reasoned judgment in reducing the sentence to life imprisonment.

Alvord v. State, 322 So.2d 533, 540 (Fla. 1975) (emphasis added). The Florida Supreme Court regularly reevaluates the evidence in death penalty cases either to sustain the sentence or to reverse it on a factual basis overlooked by the trial court. *See, e.g., Mines v. State*, 390 So.2d 332 (Fla.1980), *cert. denied*, 451 U.S. 916, 101 S.Ct. 1994, 68 L.Ed.2d 308 (1981); *Kampff v. State*, 371 So.2d 1007, 1010 (Fla.1979); *Shue v. State*, 366 So.2d 387, 389-90 (Fla. 1978); *Huckaby v. State*, 343 So.2d 29, 33-34 (Fla.), *cert. denied*, 434 U.S. 920, 98 S.Ct. 393, 54 L.Ed.2d 276 (1977); *Harvard v. State, supra*; *Jones v. State*, 332 So.2d 615, 619 (Fla.1976); *Songer v. State, supra*; *Taylor v. State*, 294 So.2d 648, 651 (Fla. 1974).

Death sentence review by the Florida Supreme Court, therefore, affects the "substantial rights" of the defendant, who is entitled to at least a minimum of due process protection. *Mempa v. Rhay*, 389 U.S. 128, 134, 88 S.Ct. 254, 256, 19 L.Ed.2d 336 (1967). In order for the Florida Supreme Court to review the imposition of the death sentence with "rationality and consistency," *Proffitt, supra*, 428 U.S. at 259, 96 S.Ct. at 2969, defendants and their counsel must be aware of all the material under consideration by the court. Not only is the defendant's right to counsel implicated, *Anders v. California*, 386 U.S. 738, 742, 87 S.Ct. 1396, 1399, 18 L.Ed.2d 493 (1967), but so is the right of confrontation. *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); *Douglas v. Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965). The receipt of psychiatric and psychological reports from the Department of Corrections also implicates a defendant's Fifth Amendment rights. *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981) (recognizing Fifth Amendment right to be informed of right to remain silent, to have questions cease, and to consult with an attorney before being subjected to psychiatric examination that may be used against defendant in capital sentencing proceedings). By considering nonrecord information without these safeguards the Florida Supreme Court has jeopardized the "degree of relia-

bility" and rationality required in the administration of the death penalty. *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 303-04, 96 S.Ct. 2978, 2990, 49 L.Ed.2d 944 (1976).

It does not matter that the Florida Supreme Court may have sought the nonrecord material for the purpose of complying with "newly-articulated [constitutional] procedural standards," such as those announced in *Lockett v. Ohio*, *supra*, and *Gardner v. Florida*, *supra*. The Florida Supreme Court itself recognized that these "procedural standards" are "required to make the statute operate in a constitutional manner." *Brown v. Wainwright*, *supra*, 392 So.2d at 1333 n. 17. Even this explanation for soliciting the information, however, is not fully satisfactory. The petitioner contends, and the state has not denied, that the Florida Supreme Court began soliciting nonrecord material as early as 1975. *Gardner* and *Lockett* were decided by the United States Supreme Court in 1977 and 1978.

It is important to note that the Florida Supreme Court has never denied considering nonrecord material of the kind alleged in this case. Instead, the court merely attempted to draw a legal distinction between the statutory "review" process and constitutionally required "supervisory standards." The majority's acceptance of this distinction, in my opinion, is nothing more than the adoption of a legal conclusion expressed by the Florida Supreme Court. Even when the court in *Brown* stated that "non-record information we may have seen, even though never presented to or considered by the judge, the jury, or counsel plays no role in capital sentence 'review,'" 392 So.2d at 1332-33, the court was only articulating its statutorily imposed duty. It was not stating its actual practice. For this reason I find it unnecessary to discuss the "presumption of regularity" relied on in part by the majority.

I do not wish to imply that the Florida Supreme Court has been dishonest or has attempted to "cover-up" the facts. The point of this dissent is that it is constitutionally unacceptable for this Court to affirm the denial of a writ of habeas corpus when the Florida Supreme Court has admitted considering nonrecord material for the purpose of complying with the United States Constitution. In addition, the risk is great that information requested for one purpose will even unintentionally be used in connection with another. That risk, in the context of the death penalty, and in the face of an ambiguous explanation, is constitutionally unacceptable. *See Lockett v. Ohio*, *supra* at 604, 98 S.Ct. at 2964. (The "difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed."); *Gardner v. Florida*, *supra*, 430 U.S. at 364, 97 S.Ct. at 1207 (White, J., concurring) ("A procedure for selecting people for the death penalty which permits consideration of . . . secret information relevant to the 'character and record of the individual offender,' . . . fails to meet the 'need for reliability in the determination that death is the appropriate punishment' . . . " (quoting *Woodson v. North Carolina*, *supra*, 428 U.S. at 304, 305, 96 S.Ct. at 2991)). The Florida Supreme Court's role in the direct review of death sentences is of such importance that it may not choose to solicit psychiatric, psychological, and other reports without the knowledge of the defendant, and without giving defendant or his counsel an opportunity to comment on or challenge the information in the reports. Because the alleged violations in this case have gone undenied, and because the Florida Supreme Court has admitted soliciting nonrecord material as a matter of practice, in my judgment the only way to remedy this violation would be to direct the district court to grant the writ conditionally. The writ would become final in the event that the Florida Supreme Court does not grant petitioner a new direct review of his conviction and sentence. Either the new review must be undertaken completely without the benefit of nonrecord material, or, if the court decides to continue its practice, the new review must give petitioner and his counsel adequate notice of the use of nonrecord information, with adequate opportunity to comment on and challenge the material.

However, in my judgment the majority commits a more serious error than that of stamping its approval on the review given this case by the Florida Supreme Court. The majority has grievously erred by not requiring the full resentencing of petitioner as a result of the invalidity of three statutory aggravating factors considered by the jury and relied on by the judge. The petitioner is entitled to a full resentencing procedure in this case because the consideration of and reliance on invalid aggravating factors in the face of substantial evidence of mitigating factors resulted in a situation in which the presence of the invalid factors could have tipped the scales against the petitioner. By adding three impermissible "weights" to the weighing process, the sentencing discretion of the jury and the judge was not properly channeled to eliminate the risk of arbitrary, capricious, or disproportionate results. *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972); *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). In addition, the petitioner's right to have the jury and judge fully consider all mitigating evidence in his behalf, *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), was substantially diminished by the presence of "overloaded" aggravating factors. Not only was the sentencing process significantly affected by the presence of invalid factors, but the sentence itself was not "rationally reviewable" by the Florida Supreme Court. *Woodson v. North Carolina*, 428 U.S. 280, 303, 96 S.Ct. 2978, 2990, 49 L.Ed.2d 944 (1976). Moreover, after an error of this kind has been made, it is completely impermissible for the Florida Supreme Court, and now this Court, to usurp the role of sentencer by guessing as to how the jury and the judge would have decided the case in the absence of the invalid aggravating factors.

The Florida Supreme Court's original rationale for upholding a death sentence which rests partially on invalid aggravating factors was that, in the presence of at least one valid aggravating factor and in the absence of any mitigating factors, "death is presumed to be the appropriate penalty." *Ford v. State*, 374 So.2d 496, 503 (Fla.1979), *cert. denied*, 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980); *Elledge v. State*, 346 So.2d 998 (Fla.1977); *State v. Dixon*, 283 So.2d 1 (Fla.1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). The rationale was apparently modified to some extent in *Brown v. State*, 381 So.2d 690 (Fla.1980), *cert. denied*, 449 U.S. 1118, 101 S.Ct. 931, 66 L.Ed.2d 847 (1981), which held that the presence of a mitigating factor, characterized by the trial judge as of "'some minor significance,'" was not sufficient to require resentencing in the face of the invalidity of an aggravating factor, when sufficient aggravating factors remained so that the court could know that the weighing process had not been compromised by the consideration of the invalid aggravating factors. *Id.* at 696.

The danger of the *Brown* approach becomes evident in this case, however, in that the Florida Supreme Court has essentially taken over the role of sentencer. At the sentencing hearing the petitioner not only presented the statutory mitigating factor of his age (20), but also presented substantial evidence of prior good character and loyal family commitment. The petitioner argues that he had only recently become involved in crime as a result of losing his last job, and a recent involvement with drugs. Instead of remanding the case so that the jury could properly reconsider and reweigh this mitigating evidence against the valid aggravating factors, the Florida Supreme Court took it upon itself to conclude that "the *proper* sentence is the death penalty." 374 So.2d at 503 (emphasis added). The Florida Court clearly imposed its own view of the *proper* outcome over that of the sentencing authority. Even if the jury and judge were to reach the same result on remand, it is error to substitute an appellate court decision for that of the trial court sentencing authority. Otherwise, there would have been no need ever to have empaneled the jury, or to submit the jury's recommendation to the judge for findings.

By substituting its own view of the evidence for that of the jury and the judge,

the Florida Supreme Court disregards the fundamental premise of *Proffitt*, *supra*, that it is first of all the jury's, and then the judge's duty to consider "[w]hether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and . . . [b]ased on these considerations, whether the defendant should be sentenced to life or death." Fla. Stat.Ann. §§ 921.141(2)(b), (c), *quoted in Proffitt v. Florida*, *supra*, 428 U.S. at 248, 96 S.Ct. at 2964. Only after the jury and the judge have properly considered the evidence may the state supreme court "review" and "reweigh" the evidence. *Proffitt*, *supra* at 253, 96 S.Ct. at 2967. The initial jury decision, even though it is advisory, substantially affects the burden of proof to be applied by the trial judge and standard of review on appeal. "In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." *Tedder v. State*, 322 So.2d 908, 910 (Fla.1975); *quoted in Proffitt v. Florida*, *supra*, 428 U.S. at 249, 96 S.Ct. at 2965. Thus it is essential that the weighing process be first undertaken by the jury, then by the judge, and only later by the Florida Supreme Court. To do otherwise is not only to introduce elements of unreliability, but to upset the "rationality and consistency" of death sentence administration. *Proffitt*, *supra*, 428 U.S. at 259, 96 S.Ct. at 2969.

In addition, the failure to require full resentencing after invalidating three aggravating factors abrogates the substance of petitioner's rights under *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). In *Lockett* the Supreme Court held that the Eighth Amendment requires that the sentencer "not be precluded from considering, as a *mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." 438 U.S. at 604, 98 S.Ct. at 2964 (emphasis in original). In *Eddings* the Court held that "Just as the state may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer, refuse to consider, as a *matter of law*, any relevant mitigating evidence." 455 U.S. at 113, 102 S.Ct. at 875 (emphasis in original). The Supreme Court concluded that ". . . state courts must consider all relevant mitigating evidence and weigh it against the evidence of the aggravating circumstances." *Id.* The jury and judge in this case could not have effectively weighed the evidence of petitioner's character and personal record when the state had improperly placed three invalid "weights" on the same set of scales. *See Enmund v. Florida*, — U.S. —, —, 102 S.Ct. 3368, 3394, 73 L.Ed.2d 1140 (1982) (O'Connor, J., dissenting) ("Although the state statutory procedures did not prevent the trial judge from considering any mitigating circumstances, the trial judge's view of the facts, in part rejected by the state supreme court, effectively prevented such consideration."). Accordingly, the proper disposition of this case would require resentencing by both jury and judge.

For these reasons I dissent from Sections I and III of the majority opinion.

R. LANIER ANDERSON, Circuit Judge, concurring in part and dissenting in part, joined by CLARK, Circuit Judge, concurring as to Section B:

A.

I concur in Part VI (Florida Supreme Court's Standard of Review) and Part VII (Assistance of Counsel at Sentencing) of Judge Roney's opinion for the majority. I concur in the result only in Part II (Instruction on Mitigating Circumstances) and Part IV (Admission of Ford's Oral Confession). I join the dissenting opinions of Chief Judge Godbold, Judge Johnson and Judge Kravitch with respect to Part I (*Brown* Issue). With respect to Part III (Failure to Require Resentencing When Evidence Insufficient on Some Aggravating Circumstances), I would certify this issue to the Florida Supreme Court, agreeing with most

of what Judge Tjoflat has written in this regard.

B.

I respectfully dissent from Part V of the majority opinion, relating to the appropriate standard of proof. I find merit in Ford's argument that the sentencing body must be convinced beyond a reasonable doubt that the mitigating circumstances are insufficient to outweigh aggravating circumstances.[1]

It is important to note at the outset that the reasonable doubt standard has been recognized in the context of the ordinary criminal trial as a matter of fundamental fairness, *In Re Winship*, 397 U.S. 358, 363, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970), the absence of which "substantially impairs the truth-finding function." *Ivan V. v. City of New York*, 407 U.S. 203, 205, 92 S.Ct. 1951, 1952, 32 L.Ed.2d 659 (1972).

Ford's argument, that the factfinder must be convinced beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances, presents a novel question. The most forceful reason[2] given by the majority in rejecting the argument is its assertion that the process of weighing is not "susceptible to proof by either party." The majority suggests that the sentencing body is required *only* to consider and weigh the several aggravating and mitigating factors, which thus guide and channel the sentencing function. The majority makes an implicit comparison to the traditional sentencing function where the trial judge weighs numerous factors and selects a sentence from among a wide range of options, e.g., a ten year sentence selected from a permissible range of zero to fifteen years. No one would suggest that the trial judge, in such traditional sentencing, can consider only subsidiary facts which are proven beyond a reasonable doubt, nor that the specific sentence selected, as opposed to one of several years more or several years less, must be justified beyond a reasonable doubt.

However, I respectfully suggest that the sentencing process in a death case is qualitatively different from traditional sentencing. *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (plurality opinion); *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (plurality opinion). As a result, the Supreme Court has made it clear that special procedures must govern the sentencing process in a death case. Among those special procedures, Florida has provided for a bifurcated hearing on sentencing which resembles the original trial in many respects, including the requirement that certain findings of fact must be made if the death sentence is to be imposed. See *Bull-*

1. Ford also argues that the existence of the statutory aggravating circumstances themselves must be proved beyond a reasonable doubt. I agree with Judge Roney that state law does require proof beyond a reasonable doubt of the existence of such aggravating circumstances. *State v. Dixon*, 283 So.2d 1, 9 (Fla. 1973). In my opinion, the reasoning developed in the text below also compels the same result as a matter of constitutional due process. However, I agree with Judge Roney that the facts of this case, with respect to the existence of the aggravating circumstances, are undisputed, and therefore that we can conclude that the failure to apply the proper reasonable doubt standard to those undisputed facts is harmless beyond a reasonable doubt.

I also agree with Judge Tjoflat that *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), would bar Ford's reliance on the principle that the existence of aggravating circumstances must be proved beyond a reasonable doubt. There was a procedural default because Ford did not object at trial. Because the facts relating to the aggravating circumstances were largely undisputed, there was no actual prejudice to Ford, and therefore the *Sykes* cause and prejudice standard is not satisfied.

2. The majority opinion also asserts, as a reason for rejecting Ford's argument, the fact that the Supreme Court has declared the Florida Statute constitutional on its face. *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) (plurality opinion). I respectfully point out that *Proffitt* did not address the issue now before this court, *i.e.*, whether due process requires the reasonable doubt standard of proof. *Proffitt* expressly addressed only "whether the imposition of the death sentence in this case constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Id.*, at 247, 96 S.Ct. at 2964.

ington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981). Thus, the Florida sentencing phase is significantly different from the majority's conception of a *mere consideration* of enumerated aggravating and mitigating factors. The Florida statute expressly requires that certain prerequisite *findings of fact* be made:

> *Findings in support of sentence of death.* — . . . the court . . . shall set forth its *findings* upon which the sentence of death is based as to the *facts*:
>
> (a) That sufficient aggravating circumstances exist . . . and
>
> (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

Fla.Stat. § 921.141(3) (emphasis added). The statutory scheme expressly provides that the determination of whether aggravating circumstances outweigh mitigating circumstances is a finding of fact.

This construction of the Florida statute is supported by *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981). There the Supreme Court, in another context, recognized the significant difference between the sentencing process in a death case and traditional sentencing:

> The procedure that resulted in the imposition of the sentence of life imprisonment upon petitioner Bullington at his first trial, however, differs significantly from those employed in any of the Court's cases where the Double Jeopardy Clause has been held inapplicable to sentencing. The jury in this case was not given unbounded discretion to select an appropriate punishment from a wide range authorized by statute. Rather, a separate hearing was required and was held, and the jury was presented both a choice between two alternatives and standards to guide the making of that choice. Nor did the prosecution simply recommend what it felt to be an appropriate punishment. It undertook the burden of *establishing certain facts* beyond a reasonable doubt in its quest to obtain the harsher of the two alternative verdicts. The presentence hearing resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence. It was itself a trial on the issue of punishment so precisely defined by the Missouri statutes.
>
> In contrast, the sentencing procedures considered in the Court's previous cases did not have the hallmarks of the trial on guilt or innocence. In *Pearce*,[3] *Chaffin*,[4] and *Stroud*,[5] there was no separate sentencing proceeding at which the prosecution was required to *prove—beyond a reasonable doubt or otherwise—additional facts* in order to justify the particular sentence. In each of the cases, moreover, the sentencer's discretion was essentially unfettered. In *Stroud*, no standards had been enacted to guide the jury's discretion. In *Pearce*, the judge had a wide range of punishments from which to choose with no explicit standards imposed to guide him. And in *Chaffin*, the discretion given to the jury was extremely broad.

451 U.S. at 438-39, 101 S.Ct. at 1858 (footnotes in original omitted) (emphasis added). See also *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) (plurality opinion); *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976).

Bullington demonstrates that the sentencing phase of a death case is significantly different from traditional sentencing, because the fact finder must choose between only two alternative penalties and because additional findings must be made to justify the death sentence. I submit that the majority has erred in perceiving the Florida scheme as a mere consideration of aggravating and mitigating factors, analogous to

3. *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969).

4. *Chaffin v. Stynchcombe*, 412 U.S. 17, 93 S.Ct. 1977, 36 L.Ed.2d 714 (1973).

5. *Stroud v. United States*, 251 U.S. 15, 40 S.Ct. 50, 64 L.Ed. 103 (1919).

traditional sentencing: the Florida statute expressly requires two crucial findings of fact,[6] that sufficient aggravating circumstances exist and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

Implicit in the majority position is a further argument to the effect that even though the issue involves a finding, nevertheless it is a finding which results from the process of weighing subsidiary facts and it is a finding which involves a large measure of subjective judgment on the part of the fact finder. Such a finding, the majority apparently reasons, is not susceptible to proof under any objective standard. The fallacy of the argument, however, lies in the failure to perceive the standard of proof in terms of the level of confidence which the fact finder should have in the accuracy of his finding:

> The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to "instruct the factfinder concerning the *degree of confidence* our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."

Addington v. Texas, 441 U.S. 418 at 423, 99 S.Ct. 1804 at 1807, 60 L.Ed.2d 323 (1979) (emphasis added) (quoting from *In Re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (Harlan, J., concurring at 370, 90 S.Ct. at 1075)). The crux of my dissent is that it is both possible and necessary that the judge and jury have a high degree of confidence in the accuracy of the finding that the death penalty is warranted. The crucial difference between the majority and me is that the majority assumes that it is not possible or appropriate to apply any standard. I respectfully submit that the above quotation from *Addington* demonstrates that the Supreme Court has applied a standard of confidence in an analogous context. *Accord, Santosky v. Kramer*, ——— U.S. ———, ———, 102 S.Ct. 1388, 1393, 71 L.Ed.2d 599 (1982).

I see no logical obstacle to a jury instruction—or a legal requirement upon the trial judge—to the effect that the instant finding must be made beyond a reasonable doubt, *i.e.*, that the fact finder must have a high degree of confidence in the accuracy of the finding. To the contrary, many findings involve weighing of subsidiary facts and judgment similar to the instant finding. Indeed, the reasonable doubt standard is applied to comparable findings in the death penalty sentencing phase by numerous states as a matter of state law.[7] On the

6. I agree with Judge Tjoflat, Opinion of Tjoflat, Circuit Judge, at 831 n. 17, that the process of weighing aggravating circumstances should more properly be labeled a normative, policy decision based on findings of subsidiary facts and the exercise of a large measure of judgment. Thus, I agree that the Florida statute is less than precise when it expressly labels this finding as one of fact. However, I also agree with Judge Tjoflat that the label is not significant and that it is appropriate to apply a standard of confidence, *i.e.*, to require that the judge or jury have a high degree of confidence in the accuracy of their conclusion. The importance of the above discussion of the Florida statute and *Bullington* is not that findings of fact are required in the sentencing phase, but rather that certain articulated findings (whatever the label) are prerequisites. As demonstrated in the text below, it is both possible and necessary to apply a standard of confidence to this finding, whether it is called a finding of fact or a finding which involves a large measure of judgment or policy.

7. In fact, in Florida itself the reasonable doubt standard has been applied to weigh aggravating and mitigating circumstances. *Jackson v. State*, 366 So.2d 752, 757 (Fla.1978) (*per curiam*) (quoting from the trial judge's findings of fact: "The aggravating circumstances in this case purely outweigh beyond and to the exclusion of every reasonable doubt in the Court's mind the mitigating circumstances"), *cert. denied*, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979). Cf. *Tedder v. State*, 322 So.2d 908, 910 (Fla.1975) (following a jury recommendation of life a trial judge can override the advisory jury and impose a sentence of death only upon facts suggesting a sentence of death so clear and convincing that virtually no reasonable person could differ).

In addition, several state legislatures, courts, and juries have used the reasonable doubt standard to determine whether the aggravating circumstances outweigh the mitigating circumstances. Ark.Stat.Ann. § 41-1302(2) (1977) (authorizes the jury to "impose a sentence of life imprisonment without parole if it finds that

(b) aggravating circumstances do not out-

other hand, my research has disclosed no case, other than Judge Roney's opinion in this case, which has addressed the finding at issue here and held that it is not "susceptible to proof under any standard."

In *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979), the Supreme Court applied the clear and convincing evidence standard to a similar finding, thus implicitly rejecting the majority's assumption that such findings are not susceptible to proof under any objective standard. At issue there was the proper standard of proof applicable to the findings required for involuntary commitment of mentally ill persons. One of the prerequisite findings was whether the person was dangerous to himself or others such that he required hospitalization. *Addington* is instructive in the instant case because the nature of the finding there is very similar to the finding required in this case. In gauging a mentally ill person's danger to himself or others, the fact finder must weigh subsidiary facts. For example, past instances of dangerous behavior would be considered, as well as expert testimony concerning the nature of the person's illness, the possibilities that the illness could be controlled by drugs, the possibilities of recurrent episodes of the illness, and the likelihood of future instances of violence. The fact finder has to come to some conclusion as to the degree of dangerousness, and then weigh the danger to the person and society against the deprivation of liberty which involuntary commitment would entail; both require a large measure of judgment. The Supreme Court did not hesitate to require, as a matter of due process, that the fact finder have a high degree of confidence in the accuracy of its findings, *i.e.*, the clear and convincing standard.

The instant finding—that aggravating circumstances sufficiently outweigh mitigating circumstances to justify the death sentence—is one similar in nature to that in *Addington*.

I acknowledge the complexity of the findings which are preconditions to the imposition of a sentence of death. This concess-

weight [sic] beyond a reasonable doubt all mitigating circumstances found to exist"); Ohio Rev.Code Ann. § 2929.03(D)(1) (Page 1982) ("The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the sentence of death"); Wash.Rev.Code § 10.-95.060(4) (Supp.1981) ("Upon conclusion of the evidence and argument at the special sentencing proceeding, the jury shall retire to deliberate upon the following question: 'Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?' "); *State v. Wood*, 648 P.2d 71, 83–84 (Utah 1982) ("The sentencing body, in making the judgment that aggravating factors 'outweigh,' or are more compelling than, the mitigating factors, must have no reasonable doubt as to that conclusion, and as to the additional conclusion that the death penalty is justified and appropriate after considering all the circumstances"); *Reddix v. State*, 381 So.2d 999, 1013 (Miss.1980) (quoting from the jury's verdict signed by the foreman: "We further find unanimously from the evidence and beyond a reasonable doubt that after weighing mitigating circumstances and the aggravating circumstances, one against the other, that the mitigating circumstances do not outweigh the aggravating circumstances and that the defendant should suffer the penalty of death"), *cert. denied*, 449 U.S. 986, 101 S.Ct. 408, 66 L.Ed.2d 251 (1980); *Woodard v. State*, 261 Ark. 895, 553 S.W.2d 259, 266–67 (1977) ("The court in accordance with our statutes instructed the jury as follows: You may not return a verdict imposing the sentence of death unless you make written findings and conclusions . . . that beyond a reasonable doubt no mitigating circumstance or circumstances which you may find to exist outweigh or equals in weight the aggravated circumstance or circumstances"), *cert. denied*, 439 U.S. 1122, 99 S.Ct. 1034, 59 L.Ed.2d 83 (1979); *Edwards v. State*, — So.2d — (Ala.Cr.App., June 29, 1982) (available on LEXIS, States library, Omni file) (quoting from the trial court's order: "The court, having thoroughly considered the aggravating circumstances and mitigating circumstances and having carefully weighed both, is convinced beyond a reasonable doubt and to a moral certainty that the aggravating circumstances far outweigh the mitigating circumstances"); *see Bullington v. Missouri*, 451 U.S. 430, 434, 101 S.Ct. 1852, 1855, 68 L.Ed.2d 270 (1981) (under the Missouri Approved Instructions—Criminal § 15.42 (1979), a jury "must be convinced beyond a reasonable doubt that any aggravating circumstance or circumstances that it finds to exist are sufficient to warrant the imposition of the death penalty").

sion, however, relates not to *whether* to apply a standard of proof, but instead is relevant to *which* standard to apply. In *Addington*, for example, the Supreme Court expressed grave concern over the "uncertainties of psychiatric diagnosis," 441 U.S. at 432, 99 S.Ct. at 1812, remarking that such diagnosis is "to a large extent based on medical 'impressions' drawn from subjective analysis and filtered through the experience of the diagnostician." 441 U.S. at 430, 99 S.Ct. at 1811. Nonetheless, the *Addington* court acknowledged that the finding was susceptible to proof pursuant to a standard; rather the concern for the difficulty of the decision facing the fact finder was viewed as but one of several criteria to be considered by a court in determining *which* standard of proof satisfies the dictates of due process. In fact in its most recent case, *Santosky v. Kramer*, — U.S. —, —, 102 S.Ct. 1388, 1398, 71 L.Ed.2d 599 (1982), the Supreme Court relied upon the complexity of a finding as support for imposing a standard of proof higher than preponderance of the evidence. There the Court addressed the issue of what standard of proof is constitutionally required to support a finding of permanent neglect necessary to terminate parental rights. The "judgmental" and imprecise nature of the finding was deemed to magnify the chance of error, and therefore was a factor influencing the Court to require the clear and convincing standard of proof.

> At such a proceeding, numerous factors combine to magnify the risk of erroneous factfinding. Permanent neglect proceedings employ *imprecise subjective standards* that leave determinations unusually open to the *subjective values* of the judge.

— U.S. at —, 102 S.Ct. at 1399 (emphasis added).

I respectfully submit that the majority is in error in its assumption that the instant finding is not susceptible to a standard of proof. *Addington* compels this conclusion.

Having concluded that some standard of proof is applicable to the instant finding, I turn to well established principles to determine which standard of proof is appropriate. *Santosky v. Kramer*, — U.S. at —, 102 S.Ct. at 1398; *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979); *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); *In Re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The function of the standard of proof is to allocate as between the parties the risk of error. *Addington v. Texas*, 441 U.S. at 423, 99 S.Ct. at 1807, *In Re Winship*, 397 U.S. at 363–64, 90 S.Ct. at 1072. The determination of which standard to apply involves assessing interests which the individual has at stake and weighing those against the State's interests. *Addington v. Texas*, 441 U.S. at 425, 99 S.Ct. at 1808. These interests have been weighed in the ordinary criminal case as follows:

> "Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt."

In Re Winship, 441 U.S. at 364, 90 S.Ct. at 1072 (quoting from *Speiser v. Randall*, 357 U.S. 513, 525–26, 78 S.Ct. 1332, 1341, 2 L.Ed.2d 1460 (1958).

When the interest which the individual has at stake is life itself, and when it is recognized that an erroneously imposed death sentence is ultimately final precluding any correction of the error, and when Supreme Court precedent establishes the reasonable doubt standard as appropriate in ordinary criminal cases, little discussion should be necessary to conclude that the death penalty should be imposed only when the fact finder is convinced beyond a reasonable doubt. Although I submit that the propriety of the reasonable doubt standard is near obvious, the importance of the issue requires that I belabor the discussion.

The analysis required by *Addington* weighs the interests which the defendant has at stake against those of the State. The defendant's interests are obvious. Life is more precious than liberty, and of course due process requires the reasonable doubt standard in the ordinary criminal case involving the mere deprivation of liberty. Death is final; an erroneously-imposed death sentence is irretrievable. No one can dispute the transcendent value of the defendant's interests in avoiding an erroneously-imposed death sentence.

To suggest a lesser standard (or no standard) is to argue that the State has a legitimate interest in imposing the death penalty *when there is a reasonable doubt as to its propriety*. The bare statement of the argument reveals that it is unacceptable. The State's interests involve the protection of society against the dangerous propensities of the particular defendant, deterrence and vengence. Although the State's interests are legitimate and strong, they are satisfied in large measure whether or not the death penalty is imposed, because a life sentence is automatic if the death sentence is rejected. The State's interest in protecting society against this defendant could be discharged in full measure by providing for a life sentence without parole. While a finding which erroneously denies the death penalty may infringe to some degree on the State's interests in deterrence and revenge, the substituted life sentence serves these purposes in substantial degree. For example, those who contemplate committing capital crimes would face substantial deterrence in the knowledge that a sentencing body will impose the death penalty upon finding beyond a reasonable doubt that it is warranted, and in lieu thereof will impose a life sentence.

As noted earlier in this opinion, *Addington* recognizes that the complexity and difficulty of a particular finding sometimes operates as a practical consideration which weighs against using the highest, reasonable doubt standard of proof. I doubt that the finding at issue here is riddled with "subtleties and nuances" and "fallibility" to quite the same degree as the psychiatric diagnosis at issue in *Addington*. Indeed the reasonable doubt standard has apparently worked in the instant context as a practical matter, as evidenced by the fact that the standard is used in numerous states. *See* footnote 7, *supra*. In any event, this practical consideration is only one factor in the *Addington* analysis, and in the instant context is overbalanced by the transcending value of the interests which a defendant has in avoiding the erroneous imposition of the death sentence.

> Indeed, the Supreme Court has said:
>
> [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding *difference in the need for reliability* in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (plurality opinion by Stewart, Powell, and Stevens, JJ.) (footnote omitted) (emphasis added).[8] Although the Supreme

8. Accord, *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality opinion by Burger, Ch. J., Stewart, Powell and Stevens, JJ.) ("We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." *Id.* at 604, 98 S.Ct. at 2964. "When the choice is between life and death, that risk [i.e., the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty] is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Id.* at 605, 98 S.Ct. at 2965); *Gardner v. Florida*, 430 U.S. 349, 359, 363-64, 97 S.Ct. 1197, 1205, 1207, 51 L.Ed.2d 393 (1977). *See also Bullington v. Missouri*, 451 U.S. 430, 445, 101 S.Ct. 1852, 1861, 68 L.Ed.2d 270 (1981) (In holding that the Double Jeopardy Clause prevented a defendant from being sentenced to death when the jury at his first trial declined to impose the death sentence, the Court said: "The 'unacceptably high risk that the [prosecution] with its superior resources would wear a defendant down' . . . thereby leading to an erroneously imposed death sen-

Court has not yet addressed the precise question of whether due process requires that the reasonable doubt standard be applied to the prerequisite findings in the sentencing phase of a death case, the Court has, in *Woodson* and numerous other cases, made clear its insistence on a high degree of reliability. Because the standard of proof is the prime instrument in allocating the risk of error and insuring reliability, the Supreme Court cases insisting on a high degree of reliability provide strong support for my position that the reasonable doubt standard is required.

In addition to the above discussed function of the standard of proof—*i.e.*, allocation of the risk of error—*Addington* states another function: "to indicate the relative importance attached to the ultimate decision." 441 U.S. at 423, 99 S.Ct. at 1808. The Court alluded to this symbolic value in reference to cases involving individual rights where the standard of proof reflects the value society places on individual liberty. *Id.* at 425, 99 S.Ct. at 1808. Accord *Santosky v. Kramer*, — U.S. at —, 102 S.Ct. at 1397. Surely no other finding in the history of litigation is comparable in importance to the life or death issue in death cases. Accordingly, I submit that the reasonable doubt standard must apply.

For the foregoing reasons, I conclude that due process requires that the death penalty be imposed only when the fact finder is convinced beyond a reasonable doubt of the propriety of that penalty.[9]

tence would exist if the State were to have a further opportunity to convince a jury to impose the ultimate punishment.").

9. In rejecting Ford's standard of proof arguments, the majority does not rely on Ford's apparent procedural defaults. In light of the concerns expressed in Judge Tjoflat's separate opinion, however, a brief comment is appropriate.

During the sentencing phase, Ford did not object to the failure of the trial court to instruct the jury as to the standard of proof to be used when determining whether aggravating factors outweigh mitigating factors. Thus, the state courts refused to address this claim. *See Ford v. State*, 407 So.2d 907, 908 (Fla.1981). Because of this procedural default, Ford may not raise this issue before a federal court absent cause for the failure to object and actual prejudice resulting from the alleged error. *See Engle v. Isaac*, — U.S. —, —, 102 S.Ct. 1558, 1567, 71 L.Ed.2d 783, 801 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 90-91, 97 S.Ct. 2497, 2508, 53 L.Ed.2d 594 (1977). In my view, both cause and prejudice are amply demonstrated.

In *Engle v. Isaac*, the Supreme Court announced a formulation of cause that holds trial counsel to a strict duty to recognize and raise potential trial errors of constitutional magnitude. The futility of raising an argument, alone, can no longer justify counsel's failure to raise it; there can be no cause when the bases for the constitutional claim are available and other attorneys have perceived and litigated that claim. *Engle v. Isaac*, — U.S. at —, 102 S.Ct. at 1574, 71 L.Ed.2d at 804; *see Dietz v. Solem*, 677 F.2d 672, 675 (8th Cir.1982). In *Engle* itself, for example, the Court could point to recent Supreme Court precedent clearly establishing the basis for the claim asserted by Engle, as well as dozens of cases in which the claim had been raised and litigated in federal and state courts. *See also Dietz v. Solem*, 677 F.2d at 675 (although at time of trial counsel could not anticipate subsequent Supreme Court decision striking down similar jury instruction, subsequent decision relied on precedent existing at time of defendant's trial, and cited earlier cases in federal and state courts striking down similar instructions). Unlike the situation in *Engle*, I have found no federal cases in which this issue has been litigated. In those state cases in which the trial court or the jury used the reasonable doubt standard, note 7 *supra*, there is no suggestion that this issue was litigated; instead the appellate courts merely acknowledged use of that standard. Only one state court has explored the question whether the reasonable doubt standard applies to the weighing process. *State v. Wood*, 648 P.2d 71, 83-84 (Utah 1982) (explaining conclusions reached by same court in *State v. Wood*, 648 P.2d 71 (1981) (per curiam)). Its decision was handed down after Ford's direct appeal. Indeed the position of the majority opinion in this case—that the weighing process is not susceptible to a standard of proof—reflects the understandable mindset of lawyers steeped in the experience of traditional sentencing. The novelty of the question, in my view, therefore constitutes sufficient cause for Ford's failure to raise the issue at trial. To hold otherwise would be "to adopt a rule that would require trial counsel either to exercise extraordinary vision or to object to every aspect of the proceedings in the hope that some aspect might mask a latent constitutional claim." *Engle v. Isaac*, — U.S. at —, 102 S.Ct. at 1572, 71 L.Ed.2d at 802. If the "tools" necessary to construct the constitutional claim are lacking, a defendant's procedural default should be excused.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

U.S. COURT OF APPEALS
FILED
MAR 17 1983
Norman E. Zoller
Clerk

No. 81-6200

ALVIN BERNARD FORD,

Petitioner,

versus

CHARLES G. STRICKLAND, JR., Warden
Florida State Prison; LOUIE L. WAINWRIGHT,
Secretary, Department of Offender
Rehabilitation, State of Florida,
JIM SMITH, Attorney General, State of Florida,

Respondents.

Appeal from the United States District Court for the
Southern District of Florida

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion JANUARY 7, 11 Cir., 1983, _____F.2d_____).

(March 17, 1983)

Before *ALL ACTIVE ELEVENTH CIRCUIT JUDGES

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

Paul H. Roney

United States Circuit Judge

*Judge Joseph W. Hatchett is recused.

REHG-6
(Rev. 6/82)

CHAPTER 921

SENTENCE

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon

the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

History.—s. 237a, ch. 19684, 1939; CGL 1940 Supp. 8885(246); s. 119, ch. 70-339; s. 1, ch. 72-72; s. 9, ch. 72-724; s. 1, ch. 74-379; s. 248, ch. 77-104; s. 1, ch. 77-174; s. 1, ch. 79-353.

Note.—Former s. 919.23.

Alvin Bernard FORD, Appellant,

v.

STATE of Florida, Appellee.

No. 47059.

Supreme Court of Florida.

July 18, 1979.

Rehearing Denied Sept. 24, 1979.

Defendant was convicted in the Circuit Court, Broward County, J. Cail Lee, J., of first-degree murder, and he appealed. The Supreme Court held that: (1) that penalty statute was not per se violative of defendant's right to enjoy life; (2) refusal to allow defense counsel to recall eyewitness for further cross-examination in nature of impeachment was not error under circumstances; (3) denial of motion to sequester jury by reason of purported misconduct consisting of comments allegedly made by one juror at a racetrack and by reason of media coverage was not error under facts presented, and (3) given presence of aggravated circumstances and lack of any mitigating factors, imposition of death penalty was not improper and did not deny defendant due process.

Affirmed.

1. Constitutional Law ⇐82(6)
Homicide ⇐351

Statute authorizing sentence of death on conviction of first-degree murder is not per se violative of defendant's right to enjoy life. West's F.S.A. § 921.141; West's F.S.A.Const. art. 1, § 2.

2. Witnesses ⇐332

Refusal to allow defense counsel to recall eyewitness to crime for further cross-examination in nature of impeachment via an alleged prior inconsistent statement was not error where defense counsel failed to lay a proper predicate for eyewitness' impeachment by presenting her with circumstances of her alleged prior inconsistent statement and where defendant was not prejudiced in any event because eyewitness herself admitted on cross-examination that she had in fact given different accounts of criminal episode at different times. F.S. 1975, § 90.10.

3. Criminal Law ⇐854(2)

There is no authority for position that denial of a motion to sequester in a capital case is an automatic abuse of discretion. 34 West's F.S.A. Rules of Criminal Procedure, rule 3.370(a).

4. Criminal Law ⇐854(1)

Denial of defendant's motion to sequester jury by reason of extensive media coverage was not error in absence of evidence of unfair or unduly pervasive media coverage of trial or events which preceded it. 34 West's F.S.A. Rules of Criminal Procedure, rule 3.370(a).

5. Criminal Law ⇐854(1)

Trial court did not err in refusing to sequester jury by reason of alleged misconduct of a juror by reason of comments made by him at a racetrack where, aside from fact that juror denied categorically that he told his companions at racetrack anything beyond fact that he was sitting on case, transgression allegedly committed by juror was not such as to require sequestration.

6. Homicide ⇐354

That homicide was committed while defendant was engaged in attempted commission of crime of robbery and that capital felony was committed for pecuniary gain should not have been treated as independent aggravating factors, but since five other aggravating circumstances could properly be said to exist in case, and since there were no mitigating factors present, death was presumed to be appropriate penalty on conviction of first-degree murder. West's F.S.A. §§ 921.141, 921.141(5)(a, b, d).

7. Homicide ⇐354

Conclusion was inescapable, given presence of five aggravated circumstances in absence of mitigating factors, that proper sentence on conviction of murder in the first degree was a sentence of death. West's F.S.A. §§ 921.141, 921.141(5)(a, b, d).

8. Constitutional Law ⇐270(2)

Defendant was not denied due process in imposition of death sentence on conviction of first-degree murder due to consideration by trial judge of information which defendant had no opportunity to deny or explain. West's F.S.A. §§ 921.141, 921.141(5)(a, b, d); U.S.C.A.Const. Amend. 14.

Robert T. Adams, Jr., Marianna, for appellant.

Jim Smith, Atty. Gen., and Patti Englander, Asst. Atty. Gen., Tallahassee, for appellee.

PER CURIAM

This cause is here on direct appeal from a conviction of first degree murder and sentence of death. We have jurisdiction under article V, section 3(b)(1), Florida Constitution.

On the morning of July 21, 1974, Ford and three others, who had decided to commit a robbery, went with weapons to a Red Lobster Restaurant in Fort Lauderdale, Florida. During the robbery, after two people had escaped from the restaurant, Ford's three accomplices realized the police would soon arrive and so left the scene of the crime. Ford remained in order to effectuate the theft of some $7,000 from the restaurant's vault and was confronted by Officer Dimitri Walter Ilyankoff of the Fort Lauderdale Police Department. Ford shot the policeman three times, wounding him fatally. Appellant escaped in the decedent's police car, and his fingerprints were later found in the vehicle after it had been abandoned. He was arrested in the vicinity of Gainesville, Florida, and was returned to Fort Lauderdale for indictment and trial.

At trial, defense counsel moved to sequester the jury in view of allegedly heavy media coverage of all the events surrounding the death of the local officer. The judge denied the motion to sequester. Later in the trial, unauthorized reading material—four magazines of the *Time-Life* variety—was discovered in the jury room. A motion for mistrial was denied, it appearing to the judge that no prejudice had been demonstrated. Among the thirty witnesses presented by the State at trial was Mrs. Barbara Buchanan, an employee of the Red Lobster, who saw and heard the firing of the final shot. Some twenty witnesses later, appellant's counsel attempted to recall Mrs. Buchanan for further cross-examination after learning that she had made inconsistent statements which were not produced during discovery proceedings. This request was denied, as was the opportunity of calling another witness for the defense for the purpose of impeaching Mrs. Buchanan through evidence of her allegedly inconsistent prior statements.

Near the end of this two-week trial, defense counsel's secretary answered a call from an anonymous informant, who claimed that he had seen a juror, one Huber, in a box at a local racetrack on the preceding Friday. This informant said that he had heard Huber telling a companion that he was a juror at the trial of "the guy who killed the cop" and that the State had an "open and shut case." With the jury excluded, the secretary testified to this effect in court. Huber was brought before the judge, confirmed that he had been to the racetrack the preceding Friday, had sat where and with whom the tipster had indicated, and that he had told his companions that he was a juror on the Ford case. However, Huber denied that he had made any statement suggesting that he had made up his mind about the defendant's guilt or innocence. The judge denied a defense motion for mistrial on the basis of juror misconduct.

The jury found appellant guilty of first degree murder, and after the second phase of the trial held pursuant to section 921.141, Florida Statutes (1975), recommended the death penalty. The trial court entered judgment on the verdict and sentenced Ford to death.

On this appeal Ford raises three points. The first is that the death penalty statute is unconstitutional on both state and federal constitutional grounds. Second, he contends that the court's refusal to allow de-

fense counsel to recall Mrs. Buchanan for further cross-examination in the nature of impeachment was erroneous. Third, he argued that, in light of subsequent juror misconduct, it was reversible error for the trial court to deny a motion to sequester the jury.

[1] Section 921.141, Florida Statutes (1975), has been authoritatively upheld as constitutional on both state and federal grounds. *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *State v. Dixon*, 283 So.2d 1 (Fla.1973). To the extent that *Dixon* did not lay to rest appellant's argument that the death penalty is *per se* violative of the "right to enjoy life" under article I, section 2, Florida Constitution, we do so now.

As indicated above, at trial the State produced an eyewitness who saw and heard the last shot and identified Ford as the killer. After being examined by counsel for both sides, Mrs. Buchanan was excused. Later, appellant's attorney learned from another lawyer not involved in this case that the witness had made allegedly inconsistent statements with regard to this identification at a bond hearing held three months earlier for DeCosta, one of the other men charged with the instant criminal action. Apparently, the testimony at the DeCosta bond hearing was never transcribed, although the prosecuting attorney in Ford's case was aware of its existence and had in fact participated in the hearing. Appellant's attorney asked that Mrs. Buchanan be called for further cross-examination. The trial judge denied the request. Defense counsel later asked that a Fort Lauderdale police officer, one Bucata, be called as a witness for the defendant to testify to the fact that Mrs. Buchanan had told him that she could not see the killer above the waist. The defense evidently thought that such testimony would provide the predicate for impeachment by further cross-examination of Mrs. Buchanan concerning her ability to identify the defendant, an issue of critical importance in the trial. In his brief appellant submits that "[t]his factual situation clearly shows an abuse of discretion by the trial court in a capital case."

[2] We do not find that the court erred in declining to accede to the defense request to recall Mrs. Buchanan for further cross-examination. Section 90.10, Florida Statutes (1975), clearly sets forth the prerequisites to impeachment of an adverse witness:

> Impeachment of witness by adverse party.—If a witness, upon cross-examination as to a former statement made by him relative to the subject matter of the cause and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to witness, and he must be asked whether or not he made such statements.

Under the statute it is clear that a proper predicate for Mrs. Buchanan's impeachment could have been laid only by presenting her with the circumstances of her alleged prior inconsistent statement. This defense counsel failed to do. It was not the State's responsibility to transcribe the text of the DeCosta hearing, and nothing prevented defense counsel from requesting that such a transcription of Mrs. Buchanan's allegedly inconsistent testimony be made for purposes of impeachment at trial. Defense counsel never moved for a continuance to allow a court reporter to transcribe notes taken at the prior hearing. (We might point out that appellant has not furnished us a transcript of such testimony even now to aid us in determining the merit of this point on appeal.) Much the same can be said of the attempt to call Officer Bucata about the allegedly conflicting statements concerning identification which Mrs. Buchanan had supposedly made to him. Defense counsel had had an opportunity to explore this matter in cross-examination; trial judges have considerable latitude in deciding whether to alter orderly courtroom procedure, even in order to compensate for an attorney's oversight. *See generally Rose v. Yuille*, 88 So.2d 318 (Fla.1956); *Arbogast*

v. *State*, 266 So.2d 161 (Fla.3d DCA 1972); *Bowen v. Manuel*, 144 So.2d 341 (Fla.2d DCA 1962). Finally, the appellant was not prejudiced by the trial court's rulings because the witness herself admitted on cross-examination that she had in fact given differing accounts of this criminal episode at different times:

> "Q [Defense Counsel] Well, just let me ask you this: We are all human. With regard to these three or four times you talked to the officers and at least a couple of times with Mr. Satz, did your stories differ, at least to some extent, considering all of those statements?
>
> "A Yes.
>
> "Q They did; correct?
>
> "A Yes."

Appellant's third argument is that, in view of subsequent juror misconduct, it was reversible error for the trial court to have denied his motion to sequester the jury. The purported misconduct consisted of the comments allegedly made by Huber at the racetrack and of the presence in the jury room during trial (but before deliberations) of news magazines which included articles on "Godfather II" and "The Law: Living on Death Row." Appellant further urges that it is an automatic abuse of discretion to deny a motion to sequester the jury in a capital case.

[3, 4] The State argues correctly that there is no authority for appellant's position that denial of a motion to sequester in a capital case is an automatic abuse of discretion. Rule 3.370(a), Florida Rules of Criminal Procedure, leaves the decision to the trial judge's discretion, and there is nothing about a capital case which makes a refusal to sequester a *per se* abuse of that discretion. Furthermore, the appellant has made no showing that there was such an abuse in the instant case. At trial, appellant's motion to sequester was supported only by the recollections of his counsel:

> I would at this time move the Court to sequester the jury. As I indicated, it would be a distinct possibility. I don't think anybody is going to purposely violate the rule of the Court, particularly the jurors, but, Judge, knowing the news media, who are still present in the courtroom, I don't see how anybody can live in society with electronics, TV, radio driving to the courthouse in the morning, and not get some squib in the nature of the ones that were on in the morning, that is, to the effect that this was an execution.
>
> All you have to do is hear something about "This was an execution," in my opinion, and we are going to have to start over. I do not think it is an unreasonable request at this time for this case and I am referring specifically to the WFTL news broadcast, about 8:00 o'clock this morning, followed by some comments of a fellow, identified on the radio as Joe Barberett, who was sort of editorializing, which I happen to have heard riding to work this morning.

Nothing in the record before us suggests the existence of unfair or unduly pervasive media coverage of this trial or the events which preceded it. Absent such a showing, the trial judge's denial of Ford's motion to sequester was correct.

[5] Of appellant's two *post hoc* grounds for challenging the denial of the motion to sequester, the only one which merits discussion is his attempt to utilize the alleged misconduct of juror Huber as a "bootstrap" to a conclusion that the court erred in refusing to sequester the jury from the outset. First, the court promptly questioned Huber about the incident, and the juror denied categorically that he told his companions at the racetrack anything beyond the fact that he was sitting on the Ford case. Thus *Durano v. State*, 262 So.2d 733 (Fla.3d DCA 1972), relied upon by appellant, is inapplicable because there the juror admitted discussing the merits of the case with an outsider. Second, even if one believes the anonymous tipster's story, as related by defense counsel's secretary, rather than Huber's account of the incident, it becomes clear that the transgression allegedly committed by the juror is not the evil at which sequestration is directed. Sequestration is designed to keep the jurors insulated from improper influences during

the course of the trial, the phone call suggests that Huber had made up his mind *before* trial and was attempting to express *his* views to others, not vice versa. Finally, defense counsel expressly decided not to move that Huber be dismissed from the panel and replaced by an alternate, despite the trial judge's evident willingness to entertain such a motion.

We note further that the trial judge and defense counsel agreed after the verdict that the latter would ask juror Huber to identify the young couple to whom he spoke at the racetrack about his status as a juror in the Ford case. Appellant's counsel could then interview these people and include in his motion for new trial any helpful information such an investigation developed; since there is no reference in the record to the result of such an inquiry, we must conclude that it did not yield anything further.

[6] We come now to the matter of appellant's sentence of death. The trial judge carefully set forth his analysis of the applicability of the statutory aggravating and mitigating circumstances under section 921.141, Florida Statutes (1975), to the facts of this case.[1] He found that *none* of the

1. SENTENCE

The defendant was indicted for the crime of Murder in the first degree of Dimitri Walter Ilyankoff, age 40.

The Jury found the defendant guilty of Murder in the first degree of the said Dimitri Walter Ilyankoff, pursuant to which finding the Court adjudged the defendant to be guilty of Murder in the first degree.

The Court having heard all the evidence in this case, and having had the benefit of a pre-sentence investigation and report conducted by the Broward County office of the Florida Parole and Probation Commission at the request of the defendant, and having had the further benefit of an advisory sentence found and returned by the Trial Jury herein recommending that sentence of death be imposed against the defendant, the Court hereby makes its findings as to each of the elements of aggravation and/or mitigation which are set forth in Florida Statutes and which were guide-lines for the Jury in considering its Advisory Sentence.

The Court has summarized the facts as brought out in the Trial and in the pre-sentence investigation report and applied them to each element of aggravation and/or mitigation where such elements are applicable.

In summarizing these elements of aggravation and/or mitigation, the Court has listed them in reverse order as follows:

MITIGATING CIRCUMSTANCES

A. WHETHER DEFENDANT HAS NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY.

FACT:

On or about March 18, 1972, the defendant was found guilty of the felony offense of breaking and entering with intent to commit a felony. He was placed on probation, which probation he has now obviously violated.

FACT:

The pre-sentence investigation report reflects that defendant was repeatedly involved in criminal narcotics violations, including, among other things, numerous large sales of cocaine for profit.

CONCLUSION:

There is no mitigating circumstance under this paragraph because there was a significant history of other criminal activity by the Defendant.

B. WHETHER THE MURDER WAS COMMITTED WHILE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE.

FACT:

Although the Defendant did not testify the testimony of the other witnesses involved in the incident reflected the Defendant was in control of his own activities and, in fact, in control of the situation. He voluntarily chose to remain at the scene after the three others involved had fled, thereby creating the confrontation out of which the instant case arose.

FACT:

The Defendant was examined by a psychiatrist, Dr. David Taubel, of Broward County, Florida, who testified that the Defendant understood the nature and quality of his acts, but that he had a basic hostility towards society, although Dr. Taubel further testified that the Defendant could be salvaged, he admitted that it would be a long and involved process.

CONCLUSION:

There is no mitigating circumstance under this paragraph.

C. WHETHER THE VICTIM WAS A PARTICIPANT IN THE DEFENDANT'S CONDUCT OR CONSENTED TO THE ACT.

FACT:

The defendant, having already grievously wounded the decedent, Dimitri Walter Ilyankoff, again shot Dimitri Walter Ilyankoff in the head after he was helpless, no longer constituted a threat to the defendant nor to his escape and, in fact, after the decedent repeatedly asked for aid.

CONCLUSION:

There is obviously no mitigating circumstance under this paragraph.

mitigating circumstances but *all* of the aggravating circumstances were present.

D. WHETHER THE DEFENDANT WAS AN ACCOMPLICE IN THE MURDER COMMITTED BY ANOTHER PERSON, AND THE DEFENDANT'S PARTICIPATION WAS RELATIVELY MINOR.

FACT:
The trial evidence showed that as set forth in paragraph B above, the defendant voluntarily remained at the scene after the other participants in the crime had fled. The defendant was obviously a principal and, in fact, major principal in the murder of Dimitri Walter Ilyankoff.

CONCLUSION:
There is no mitigating circumstance under this paragraph.

E. WHETHER THE DEFENDANT ACTED UNDER EXTREME DURESS OR UNDER THE SUBSTANTIAL DOMINATION OF ANOTHER PERSON.

FACT:
No element of duress was ascertained by the psychiatrist as set forth in paragraph B above. There is absolutely no testimony of duress in any degree which would justify the crime of which he was convicted.

CONCLUSION:
There is no mitigating circumstance under this paragraph.

F. WHETHER THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED.

FACT:
As stated in paragraph B above, Dr. Taubel determined that the defendant was intelligent and able to understand the nature and quality of his acts. The evidence showed that the defendant had in the past held jobs and positions of considerable responsibility and that he had had at least some exposure to a college education.

CONCLUSION:
There is no mitigating circumstance under this paragraph.

G. THE AGE OF THE DEFENDANT AT THE TIME OF THE CRIME.

FACT:
The defendant is a twenty-one year old black male, apparently physically mature and with at least an average intelligence without any impairment of the reasoning process.

CONCLUSION:
Although defendant's comparative youth might be considered a mitigating circumstance, it is not of sufficient mitigation to overcome the other circumstances of this case.

CONCLUSION OF COURT

There are no mitigating circumstances existing—either statutory or otherwise—which outweighs any aggravating circumstances, to justify a sentence of life imprisonment rather than a sentence of death.

While we agree that none of the mitigating circumstances are applicable, it is our conclusion that the aggravating circumstances are sufficient to justify the sentence of death.

The Court now summarizes the facts brought out in trial and the pre-sentence investigation and applies them to the elements of aggravation which were considered by the Jury in arriving at their Advisory Sentence.

AGGRAVATING CIRCUMSTANCES

A. WHETHER THE DEFENDANT WAS UNDER SENTENCE OF IMPRISONMENT WHEN HE COMMITTED THE MURDER OF WHICH HE WAS CONVICTED.

FACT:
Although the defendant was not imprisoned at the time of the murder, he did actually prevent arrest, prosecution and imprisonment for his other crime at least temporarily, by the very murder for which he has been convicted.

CONCLUSION:
This is an aggravating circumstance which justifies a sentence of death.

B. WHETHER THE DEFENDANT HAS PREVIOUSLY BEEN CONVICTED OF ANOTHER CAPITAL FELONY OR OF A FELONY INVOLVING THE USE OF THREAT OF VIOLENCE TO THE PERSON.

FACT:
The defendant has been found guilty of breaking and entering to commit a felony, which would obviously involve the threat of violence to the person of anyone whom he might have confronted on the premises. Further, he has admitted the unlawful sale of narcotics drugs, which likewise involves a threat to the safety of members of the public.

CONCLUSION:
There is an aggravating circumstance under this paragraph which justifies the imposition of the sentence of death.

C. WHETHER, IN COMMITTING THE MURDER OF WHICH HE HAS JUST BEEN CONVICTED, THE DEFENDANT KNOWINGLY CREATED A GREAT RISK OF DEATH TO MANY PERSONS.

FACT:
The trial evidence shows that the defendant not only threatened a number of other persons beside the decedent with a deadly weapon, he further operated a stolen motor vehicle at high rates of speed and at an obvious risk to the lives and safety of many others on the highways.

CONCLUSION:
There is an aggravating circumstance under this paragraph.

D. WHETHER THE MURDER OF WHICH DEFENDANT WAS CONVICTED WAS COMMITTED WHILE HE WAS ENGAGED IN THE COMMISSION OF, OR AN ATTEMPT TO COMMIT, OR FLIGHT

clusion that the court erred in finding the existence of two of the aggravating circumstances, those listed in sections 921.141(5)(a) (defendant under sentence of imprisonment when capital felony committed) and (5)(b) (defendant previously convicted of another capital felony or of a felony involving the use or threat of violence to the person), Florida Statutes (1975). We note also that the trial judge found as separate aggravating factors that the homicide was committed while appellant was engaged in the attempted commission of the crime of robbery [section 921.141(5)(d), Florida Statutes (1975)], and that the capital felony was committed for pecuniary gain [section 921.141(5)(f), Florida Statutes (1975)]. Under the circumstances of this case the considera-

AFTER COMMITTING OR ATTEMPTING TO COMMIT, ANY ROBBERY, RAPE, ARSON, BURGLARY, KIDNAPPING, AIRCRAFT PIRACY, OR THE UNLAWFUL THROWING, PLACING OR DISCHARGING OF A DESTRUCTIVE DEVICE OR BOMB.

FACT:

The murder committed by defendant was committed during his attempted commission of the crime of robbery.

CONCLUSION:

There is an aggravating circumstance under this paragraph in that defendant was attempting to commit the crime of robbery at the time of the commission of the within murder.

E. WHETHER THE MURDER OF WHICH THE DEFENDANT HAS BEEN CONVICTED WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY.

FACT:

As previously stated the evidence and testimony showed that the defendant committed the murder for which he stands convicted for the purpose of preventing his lawful arrest at the time of the robbery.

CONCLUSION:

There is an aggravating circumstance here in that he did murder Dimitri Walter Ilyankoff to avoid and prevent his arrest.

F. WHETHER THE MURDER OF WHICH THE DEFENDANT HAS BEEN CONVICTED WAS COMMITTED FOR PECUNIARY GAIN.

FACT:

The evidence and testimony showed that the defendant during the commission or the attempt to commit a robbery forced the restaurant manager to open the safe and, in fact, refused to leave with the other miscreants presumably because he had not had time to empty the safe of its contents.

CONCLUSION:

There is an aggravating circumstance in this paragraph in that the defendant remained after the others involved in the crime of robbery had already left in order to avail himself of the remaining contents of the safe.

G. WHETHER THE MURDER OF WHICH THE DEFENDANT HAS BEEN CONVICTED WAS COMMITTED TO DISRUPT OR HINDER THE LAWFUL EXERCISE OF ANY GOVERNMENTAL FUNCTION OR THE ENFORCEMENT OF LAWS.

FACT:

The defendant shot the decedent, Dimitri Walter Ilyankoff, without warning while the decedent was investigating a robbery or attempted robbery.

CONCLUSION:

There is an aggravating circumstance under this paragraph.

H. WHETHER THE MURDER OF WHICH THE DEFENDANT HAS BEEN CONVICTED WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

FACT:

As previously stated the defendant shot the decedent without warning twice in the body, grievously wounding him. Then, despite the decedent's pleas for help and after he no longer constituted a threat to the defendant's safety or his escape and while the decedent was in fact completely helpless, the defendant again shot the decedent, this time in the head causing his immediate death.

CONCLUSION:

There is an aggravating circumstance under this paragraph.

CONCLUSION OF COURT

There are sufficient and great aggravating circumstances which exist to justify the sentence of death. Indeed, it is difficult to imagine a crime which is more heinous, atrocious and cruel and under our existing law it is deserving of no sentence but death. Accordingly and having adjudged you to be guilty of murder in the first degree, I hereby sentence you to be remanded instanter and without bail to the custody of the Sheriff of Broward County, Florida, for further remanding by him to the custody of the authorities of the Division of Corrections of the State of Florida, by them to be kept in close confinement in the Florida State Penitentiary System until a date is set for your execution and that on such date you be put to death in the manner prescribed by law, that is, by electrocution. You have thirty days from this date within which to appeal the Judgment and Sentence and I hereby appoint the Special Assistant Public Defender, Robert T. Adams, to represent you on your appeal.

May God have mercy on your soul.

tion of the appellant's conduct as two independent aggravating factors is faulted by our ruling in *Provence v. State*, 337 So.2d 783 (Fla.1976). Nevertheless, our review of the evidence convinces us that the other five aggravating circumstances may properly be said to exist in this case. The testimony of Mrs. Buchanan was that Officer Ilyankoff, after being wounded twice, was shot a third time when he posed no danger to Ford's escape and was in fact trying to cooperate with the armed appellant. We therefore make the specific finding that the killing was "especially heinous, atrocious, or cruel" under section 921.141(5)(h), Florida Statutes (1975). Consequently, even though there was error in assessment of some of the statutory aggravating factors, there being no mitigating factors present death is presumed to be the appropriate penalty. *Elledge v. State*, 346 So.2d 998 (Fla.1977); *State v. Dixon, supra*.

[7] We have not overlooked the testimony favorable to appellant's character and prior behavior presented by the defense in mitigation during the sentencing trial. We do not pretend to know what motivated Alvin Bernard Ford to take the life of Dimitri Walter Ilyankoff. Our duty under section 921.141, Florida Statutes (1975), as upheld by the United States Supreme Court in *Proffitt v. State, supra*, is to apply fairly the aggravating and mitigating circumstances duly enacted by the representatives of our citizenry to the facts of the capital cases which come before us. In this case the process compels the inescapable conclusion that the proper sentence is the death penalty.

In view of the opinion of the Supreme Court of the United States in *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), this Court by order entered June 21, 1977, directed to the trial judge, inquired of the trial judge whether in weighing the aggravating and mitigating circumstances of the case he considered information which the appellant had no opportunity to deny or explain. By such order, the trial judge who imposed the death sentence was directed to file a response with this Court within twenty days stating whether he imposed the death sentence in consideration of any information not known to appellant. The trial court was further directed to furnish this Court with any presentence investigation, juvenile case file information, psychiatric reports, or otherwise, which were before it for consideration in imposing sentence. Pursuant to such order, a copy of which was served upon counsel for appellant and appellee, the trial judge filed his response in this Court on July 8, 1977, certifying that copies thereof were furnished to the Honorable Michael J. Satz, State Attorney, Seventeenth Judicial Circuit; Honorable Robert E. Lockwood, Clerk of Circuit Court; Honorable Robert T. Adams, Jr., counsel for appellant; and Honorable Patti Englander, Assistant Attorney General, counsel for appellee. By his response the trial judge advises this Court that he did not impose the death sentence in consideration of any information not known to appellant. He responds that according to the court's case file records and the judge's best recollection no written psychiatric reports or juvenile case file reports were furnished to the court. He affirmatively states that a pre-sentence investigation report, copy of which was attached to his response, was prepared at the request of, and a copy furnished to, the trial attorney for appellant, Honorable Robert T. Adams, Jr., in its entirety, based on the belief of the trial judge.

[8] No response having been filed in this Court by counsel for the appellant or appellee contradicting or amplifying the response of the trial judge, and after a review of the pre-sentence investigation report, we expressly find that appellant was not denied due process in the imposition of the death sentence due to consideration by the trial judge of information which the appellant had no opportunity to deny or explain.

Accordingly, the judgment and sentence are affirmed.

ENGLAND, C. J., and ADKINS, BOYD, OVERTON, SUNDBERG and HATCHETT, JJ., concur.

Joseph Green BROWN et al., Petitioners,

v.

Louie L. WAINWRIGHT, Respondent.

No. 59732.

Supreme Court of Florida.

Jan. 15, 1981.

Defendant joined with other convicted murderers in petitioning for writ of habeas corpus to obtain relief from allegedly unconstitutional sentences of death. The Supreme Court held that: (1) joinder of habeas corpus petitions of convicted murderers previously sentenced to death was allowed to avoid absurd technicalities, even though petitioners' cases were in different stages of appellate process, and (2) consideration by Supreme Court of information concerning capital appellants, which was not presented at trial and not part of trial record or record on appeal, was not unconstitutional since Supreme Court's role was

merely to review and not to impose death sentence.

Petitions denied.

Boyd, J., concurred in result with opinion.

1. Habeas Corpus ⇐52

A joinder of habeas corpus petitions, being unique, requires close scrutiny and a compelling justification.

2. Habeas Corpus ⇐52

Joinder of habeas corpus petitions of 123 convicted murderers who had been sentenced to death would be allowed to avoid absurd technicalities, even though some of petitioners' cases were still in different stages of appellate process.

3. Criminal Law ⇐1134(1)

Supreme Court's role after death sentence has been imposed is to review lower court's decision and consists of two discrete functions: to determine if jury and judge acted with procedural rectitude in applying death sentence statute; and to ensure relative proportionality among death sentences which have been approved statewide. West's F.S.A. § 921.141.

4. Criminal Law ⇐1158(1)

If the findings of aggravating and mitigating circumstances by trial court are supported by sufficient competent evidence in the record from which the judge and jury could properly find the presence of appropriate aggravating or mitigating circumstances, if the jury's recommendation was not unreasonably rejected, and if the death sentence is not disproportionate to others properly sustainable under the death penalty statute, the trial court's sentence must be sustained even though, had Supreme Court been triers and weighers of fact, it might have reached a different result in an independent evaluation. West's F.S.A. § 921.141.

5. Criminal Law ⇐1134(2)

Consideration by Supreme Court of information concerning convicted murderers, which was not presented at trial and was not part of trial record or record on appeal, including presentence investigations, psychiatric evaluations or contact notes made in the corrections system after conviction, and psychological screening reports made after conviction by corrections personnel, during appeals from convictions imposing death sentence was not unconstitutional since Supreme Court's role was merely to review and not to impose death sentence. U.S.C.A.Const. Amends. 5, 14; West's F.S.A. § 921.141.

Samuel S. Jacobson and Albert J. Datz of Datz, Jacobson & Lembcke, Jacksonville, Marvin E. Frankel, New York City, Richard L. Jorandby, Public Defender and Craig S. Barnard, Chief Asst. Public Defender, West Palm Beach, for petitioners.

Jim Smith, Atty. Gen., and George R. Georgieff, Carolyn M. Snurkowski and Raymond L. Marky, Asst. Attys. Gen., Tallahassee, for respondent.

PER CURIAM.

Joseph Green Brown petitions the Court for a writ of habeas corpus to obtain relief from an allegedly unconstitutional sentence of death. Brown was convicted of first-degree murder and sentenced to death, following which his conviction and sentence were affirmed by this Court. *Brown v. State*, 381 So.2d 690 (Fla. 1980). An application for certiorari is now pending in the United States Supreme Court. *Brown v. Florida*, No. 80-5708 (U.S. Nov. 17, 1980).

Alleging common issues of law and fact, Brown has joined with one hundred and twenty-two other persons who seek relief from allegedly unconstitutional sentences of death. The dominant theme in the multiple requests for relief is the alleged impropriety of this Court's having considered, in the course of reviewing sentences of death, documents which were not made available to the defendants' counsel. For most of the petitioners, the alleged impropriety was the Court's consideration of undisclosed documents not related to the proceedings in which their sentences were imposed or upheld, but seen in the course of reviewing

death sentences approved or considered for *other* criminal defendants.

Before reaching the merits of the petitions, we first consider the procedural basis on which the Court has been asked to entertain habeas corpus petitions on a consolidated basis.

I

[1] The writ of habeas corpus—the common law remedy used primarily to deliver from imprisonment those who are illegally confined[1]—has long been recognized as an essential vehicle by which fundamental individual liberties are shielded from illegal governmental action.[2] Traditionally, habeas corpus has been characterized by its utility in cutting through the "procedural morass" of institutional red tape so as to secure the release of persons unlawfully detained.[3] It has been recognized, however, that no prisoner has an interest in the illegal restraint of another, since a sentence of imprisonment operates on each individually.[4] A joinder of habeas corpus petitions, therefore, being unique, requires close scrutiny and a compelling justification.

The joinder of criminal defendants in trial proceedings is commonplace. The reasons which support joinder in those situations—considerations of judicial economy flowing from the presentation of common issues of law and fact, weighed against the potential prejudice to the defendants sought to be joined[5]—provide a useful perspective from which to examine the desirability of deciding jointly the claims presented here.

In multiple habeas corpus petitions, such as those before us, prejudice to the petitioners is obviously of no concern. For one thing, these proceedings do not involve adjudications of guilt, but only the legality of petitioners' confinement as related to this Court's sentence review.[6] For another, petitioners themselves, rather than the prosecuting authority, have sought consolidated consideration.

[2] Considerations of judicial economy, then, are alone relevant here. As to these, economies become attenuated, and the potential benefits less attractive, as the disparity between legal and factual issues increases.[7] Multiple party joinder is a function of the facts and circumstances of each case, with the determination in each necessarily resting within the sound discretion of the court.[8] In the final analysis, a balancing test is employed to take into account the relative advantages and disadvantages attendant to joint consideration of the common and any noncommon claims presented.

Brown and the other petitioners in this proceeding—the one hundred and twenty-three inmates on "death row"—premise their joint filing for habeas corpus relief on alleged judicial economies which will flow from our considering in one proceeding allegedly common issues of law and fact. Those economies are not readily apparent in considering the several petitions, as the facts relevant to each vary significantly. Petitioners' appendices, and their request for a special master to develop facts further, bear this out. Petitioners' cases are even in different stages of the appellate

1. *Porter v. Porter*, 60 Fla. 407, 53 So. 546 (1910).

2. For a short overview of the history of the writ of habeas corpus, see *State ex rel. Deeb v. Fabisinski*, 111 Fla. 454, 152 So. 207 (1933).

3. *Price v. Johnston*, 334 U.S. 266, 269, 68 S.Ct. 1049, 1052, 92 L.Ed. 1356 (1948).

4. *See State ex rel. Williams v. Purdy*, 242 So.2d 498 (3d DCA), *appeal dismissed*, 248 So.2d 171 (Fla. 1971), *citing In re Kosopud*, 272 F. 330 (N.D. Ohio 1920) and *Riley v. City and County of Denver*, 137 Colo. 312, 324 P.2d 790 (1958).

5. *See Ablost v. State*, 334 So.2d 642 (3d DCA 1976), *cert. denied*, 345 So.2d 420 (Fla. 1977), and *cert. denied*, 431 U.S. 908, 97 S.Ct. 2926, 53 L.Ed.2d 1064 (1977); *Tilford v. State*, 334 So.2d 91 (Fla.3d DCA 1976), *cert. denied*, 344 So.2d 327 (1977).

6. *See* Note, *Multiparty Federal Habeas Corpus*, 81 Harv.L.Rev. 1482, 1483 (1968).

7. *See id.* at 1488.

8. *See Menendez v. State*, 368 So.2d 1278 (Fla. 1979); *Stripling v. State*, 349 So.2d 187 (Fla.3d DCA 1977), *cert. denied*, 359 So.2d 1220 (1978).

process. Joined together are persons whose appeals from sentences of death are pending in this Court and persons whose sentences have already been affirmed by this Court—some more than once. The first category of petitioners have filed requests which are obviously premature.

The economies petitioners assert only become manifest if we rule precisely in the manner petitioners have urged—a presumptuous view of the merits of the cause. The fact of the matter is that to consider Brown's claim along with each of the others would plainly prove more unwieldly than economical.[9] Unlike *In re Baker*, 267 So.2d 331 (Fla. 1972),[10] this case does not involve the routine application of a previously adjudicated constitutional issue to numerous persons who are, in reality, similarly situated. The claims for relief in these petitions present for our analysis new and unresolved constitutional issues, some applicable to one group of petitioners and some applicable to others.[11]

The joinder here is manifestly designed, at best, to curtail all executions in Florida on legal grounds not yet adjudicated or, at least, to suspend the imposition of any lawful sentence until new legal issues are resolved. The latter objective, of course, has already been achieved. To allow a joinder under these circumstances in future cases would distort habeas corpus beyond recognition and create a pernicious precedent in capital cases. We decline to approve this precedent. There is no justification for joinder in situations such as this.

[3] To avoid absurd technicalities, however, we decline to treat each petition as if it were separately filed and enter a separate order or opinion on each. Rather, our disposition of Brown's petition effectively disposes of all claims for relief of those petitioners who have joined with Brown. In the future, attempts to create a class action habeas corpus processing in situations such as this will be rejected summarily.

II

Turning to the legal issues presented, we perceive that petitioners' several constitutional claims all emanate from their assertion that we have "engaged in the continuing practice of requesting and receiving information concerning capital appellants which was not presented at trial and not a part of the trial record or record on appeal." This information allegedly includes pre-sentence investigations, psychiatric evaluations or contact notes made in the corrections system after conviction, and psychological screening reports made after conviction by corrections personnel.[12] The receipt of this information, petitioners assert generally, has led to a rash of constitutional violations ranging from a denial of due process in individual cases where information was received, on the one hand, to a pervasive violation of *Gardner v. Florida*, 430 U.S. 346 (1972), imposed life sentences on the class of persons previously sentenced to death who had not been resentenced as of that date.

9. *State ex rel. Williams v. Purdy*, 242 So.2d 498 (3d DCA), *appeal dismissed*, 248 So.2d 171 (Fla. 1971) (class action not an appropriate remedy in habeas corpus proceeding). We note that the applicability to habeas corpus of the rules concerning joinder and class actions has engendered much controversy in the federal courts. *Harris v. Nelson*, 394 U.S. 286, 294 n.5, 89 S.Ct. 1082, 1088 n.5, 22 L.Ed.2d 281 (1969); *United States ex rel. Sero v. Preiser*, 506 F.2d 1115 (2d Cir. 1974), *cert. denied*, 421 U.S. 921, 95 S.Ct. 1587, 43 L.Ed.2d 789 (1975); *Adderly v. Wainwright*, 58 F.R.D. 389, 400 (M.D.Fla. 1972). *See generally* Note, *Multiparty Federal Habeas Corpus*, 81 Harv.L.Rev. 1482 (1968).

10. In *Baker*, this Court, pursuant to the United States Supreme Court's mandate in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d

11. The disparities are highlighted by the state's motion to dismiss those of the petitions which allege no direct "taint" in our review of prisoners' sentences.

12. Petitioners also assert that we have seen and were prejudicially affected (1) by one reference in a letter to the Court that one convict refused to submit to a psychiatric report, (2) by the mention in letters to the Court that there exist probation and parole violation reports for two convicts, and (3) by the mention in another letter to the Court that there exists a prison classification and admission summary for one convict.

349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), in all capital cases reviewed and affirmed by the Court, on the other hand. In short, petitioners contend that our alleged misconduct requires our invalidation of all death sentences imposed or approved in Florida, and by necessary implication, that we declare Florida's death penalty statute invalid and unconstitutional in its operation.

Despite strident characterizations of our receipt of these materials,[13] and notwithstanding the vigor and pith of the hypotheses on which petitioners depend, the doctrines of constitutional law here argued are singularly unpersuasive. Even if petitioners' most serious charges were accepted as true, as a matter of law our view of the non-record information petitioners have identified is totally irrelevant either to our appellate function in capital cases as it bears on the operation of the statute, or to the validity of any individual death sentence.

Florida's death penalty statute, section 921.141, Florida Statutes (1979), directs that a jury and judge, not this Court, must weigh the evidence of aggravating and mitigating circumstances delineated in the statute to determine whether death is an appropriate sentence. The jury performs that function only to recommend a sentence to the trial judge. It then becomes the responsibility of the trial judge to weigh evidence of aggravating and mitigating circumstances in order to arrive at a reasoned judgment as to the appropriate sentence to impose.[14]

[3] This Court's role after a death sentence has been imposed is "review," a process qualitatively different from sentence "imposition." It consists of two discrete functions. First, we determine if the jury and judge acted with procedural rectitude in applying section 921.141 and our case law. This type of review is illustrated in *Elledge v. State*, 346 So.2d 998 (Fla. 1977), where we remanded for resentencing because the procedure was flawed—in that case a nonstatutory aggravating circumstance was considered. *See also Brown v. State*, 381 So.2d 690 (Fla. 1980); *Kampff v. State*, 371 So.2d 1007 (Fla. 1979).

The second aspect of our review process is to ensure relative proportionality among death sentences which have been approved statewide. After we have concluded that the judge and jury have acted with procedural regularity, we compare the case under review with all past capital cases to determine whether or not the punishment is too great. *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *State v. Dixon*, 283 So.2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 297 (1974). In those cases where we found death to be comparatively inappropriate, we have reduced the sentence to life imprisonment. *See Malloy v. State*, 382 So.2d 1190 (Fla. 1979); *Burch v. State*, 343 So.2d 831 (Fla. 1977); *Jones v. State*, 332 So.2d 615 (Fla. 1976).

[4, 5] Neither of our sentence review functions, it will be noted, involves weighing or reevaluating the evidence adduced to establish aggravating and mitigating circumstances. Our sole concern on evidentiary matters is to determine whether there was sufficient competent evidence in the record from which the judge and jury could properly find the presence of appropriate aggravating or mitigating circumstances. If the findings of aggravating and mitigating circumstances are so supported, if the jury's recommendation was not unreasonably rejected,[15] and if the death sentence is not disproportionate to others properly sustainable under the statute, the trial court's sentence must be sustained even though, had we been triers and weighers of fact, we might have reached a different result in an independent evaluation.

It is not the function of this court to cull through what has been listed as aggra-

13. At oral argument, counsel for petitioners charitably described our receipt of these materials as "an understandable effort to be fully informed."

14. The relationship of the judge's responsibility to the jury's, about which much has been said in our opinions, is not germane here.

15. *Tedder v. State*, 322 So.2d 908 (Fla. 1975).

vating and mitigating circumstances in the trial court's order, determine which are proper for consideration and which are not, and then impose the proper sentence. In accordance with the statute, the culling process must be done by the trial court.

Mikenas v. State, 367 So.2d 606, 610 (Fla. 1978). *Accord, Hargrave v. State*, 366 So.2d 1 (Fla. 1978), *cert. denied*, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979).

The record of each proceeding, and precedent, necessarily frame our determinations in sentence review. Our opinions, of course, then expound our analysis. Factors or information outside the record play no part in our sentence review role. Indeed, our role is neither more nor less, but precisely the same as that employed by the United States Supreme Court in its review of capital punishment cases. Illustrative of the Court's exercise of the review function is *Gulfney v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).

Petitioners' contentions in this proceeding are essentially grounded on *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). *Gardner* stands for the proposition that a sentence of death may not be imposed (note the word "imposed") to any extent on non-record, unchallengeable information. *Id.* at 362, 97 S.Ct. at 1206. Since we do not "impose" sentences in capital cases, *Gardner* presents no impediment to the advertent or inadvertent receipt of some non-record information. The Kentucky Supreme Court explained the distinction which has eluded petitioners in *Ex Parte Farley*, 570 S.W.2d 617 (Ky. 1978), responding to the very assertion that is made here concerning the review of "non-record" materials in capital cases:

> Every opinion from a case book, every text or treatise, every law review article, every philosophical, historical or religious document a judge might see fit to read and consider, including the Holy Bible, is a tangible source of information from which he may pick and choose in arriving at a judgment.
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> • • • •
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> There are obviously differences between individualized information pertaining to the defendant personally, which is to be considered by a trial judge in fixing a sentence, and the impersonal data that may be used by an appellate court in determining whether the judgment of a trial court is or is not in line with what has been done in comparable cases.
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> It seems to us that the difference is quite fundamental. If a judge or jury deciding one's fate is going to consider reports of what other people say about him, certainly he should be entitled to see them. "The risk that some of the information accepted in confidence may be erroneous, or may be misinterpreted, by the investigator or by the sentencing judge, is manifest." *Gardner v. Florida*, *supra*, at 430 U.S. 359, 97 S.Ct. 1205. But we are not the sentencing court. In any given case before us we intend to comply with the statutory request to include in our decision a reference to those similar cases that have been taken into consideration. Presumably, however, the petitioners want to know not only what will be taken into consideration, but what will not, and to know it in advance, so that they can urge upon us what to choose and what to avoid.
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> • • • •
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> We do not find it possible to believe that in *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), the Supreme Court of the United States meant to lay down a principle so pervasive as to require an appellate court to lay out for inspection by the appellant, even in a capital case, all of the information in its hands from which it may seek perspective and guidance in reviewing the propriety of his sentence. We therefore hold that *Gardner* does not apply. *Id.* at 625-27 (footnote omitted).

It is evident, once our dual roles in the capital punishment scheme are fully appreciated, that non-record information we may have seen, even though never presented to

or considered by the judge, the jury, or counsel, plays no role in capital sentence "review." That fact is obviously appreciated by the United States Supreme Court, for it very carefully differentiated the sentence "review" process of appellate courts from the sentence "imposition" function of trial judges in *Proffitt* and in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

A remaining question is whether the reading of non-record documents would so affect members of this Court that they could not properly perform their assigned appellate functions. Plainly, it would not. Just as trial judges are aware of matters they do not consider in sentencing, *Alford v. State*, 355 So.2d 108 (Fla.), *cert. denied*, 436 U.S. 935, 98 S.Ct. 2835, 56 L.Ed.2d 778 (1978), so appellate judges are cognizant of information that they disregard in the performance of their judicial tasks.[16]

The upshot of this is that petitioners' claims are untenable.

III

We cannot pass this opportunity to put this case in a more rational perspective than it has been accorded by counsel and the media. This case emerges from society's continuing wrangling over the moral and social justification for capital punishment. Regrettably, the thunderous emanations of this great debate, and the manner in which this joint petition was presented to the Court, have cast a pall on the integrity of the painful process by which this Court attempts to deal with the responsibility it has been assigned. It seems to us both unwarranted and unseemly to villify those who endeavor to follow the constitution; we are, after all, the messengers, and not the message.

Florida's death penalty statute has been held constitutional time and time again.[17] We are obliged to apply it so long as the citizens of this state deem it an appropriate punishment for select acts of criminality, and so long as the United States Supreme Court tolerates its use. Views on the subject can always be addressed to the Florida legislature or to the people of Florida, but attempts to pervert judicial processes, or to castigate the judiciary, benefit no one in the resolution of this societal debate.

The petitions of Brown and the others for writs of habeas corpus and for other extraordinary relief are denied. The motion for

16. At oral argument on the joint petitions, counsel clarified petitioners' "proportionality taint" argument. He conceded that appellate judges receive and review all types of non-record information in the course of their duties, and that there is no impropriety in that occurring. He stated, moreover, that one constitutionally infirm decision by this Court would not itself skew the entire process by which we guarantee proportionality review in capital cases, so as to invalidate all other death sentences or the operation of the statute. He asserted, rather, that a systematic pattern of constitutionally defective review would be required for the relief requested, and he claimed to have found that pattern in the Court's having received in several cases, by request or otherwise, the "tainted" materials which were never displayed to counsel. As we view the case, of course, appellate review can never be compromised, in the constitutional sense required by *Proffitt*, by the receipt of any quantity of non-record information. *Cf. Goodman v. Olsen*, No. 45,356 (Fla. July 30, 1976), *cert. denied*, 430 U.S. 945, 97 S.Ct. 1579, 51 L.Ed.2d 792 (1977), where the United States Supreme Court denied review of an order of this Court which had rejected a request to invalidate a decision of this Court allegedly made on the basis of improper, non-record information.

17. We cannot help but observe that the operation of capital punishment laws has been dependent upon a changing set of procedural principles, see *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), which have imposed shifting, supervisory standards on state high courts. The "tainted" information we are charged with reviewing was, as counsel concedes, in every instance obtained to deal with newly-articulated procedural standards. It would be ironic indeed if petitioners were successful in their assertion that our statute operates unconstitutionally because this Court has acted promptly from time to time to respond to new directives from the Supreme Court as to what procedures are required to make the statute operate in a constitutional manner.

appointment of a special master and sundry other relief is denied. The stays of execution for Carl Ray Songer and Lenson Hargrave are dissolved.

No petitions for rehearing will be entertained.

SUNDBERG, C. J., and ADKINS, OVERTON, ENGLAND, ALDERMAN and McDONALD, JJ., concur.

BOYD, J., concurs in result with an opinion.

BOYD, Justice, concurs in result with an opinion.

I am convinced that no member of this court was influenced by any extraneous materials.

Although I don't agree with all the language in the majority opinion, I concur in the result.

Alvin Bernard FORD, Petitioner/Appellant,

v.

STATE of Florida, Respondent/Appellee.

Nos. 61440, 61450.

Supreme Court of Florida.

Dec. 4, 1981.

Following conviction of murder in first degree and sentencing of defendant to death, the Circuit Court, Broward County, J. Cail Lee, J., denied motion for postconviction relief. Defendant appealed and filed original petition for writ of habeas corpus and application for stay of execution. The Supreme Court held that: (1) overwhelming nature of aggravating circumstances precluded likelihood that counsel's alleged omissions could have been prejudicial, and (2) there was not sufficient showing that any of grounds asserted in habeas corpus petition would likely have affected outcome of appeal.

Order accordingly.

1. Criminal Law ⇐998(5)

Error that may justify reversal on direct appeal will not necessarily support collateral attack on final judgment.

2. Criminal Law ⇐1023(2)

Finality as important element of criminal justice system should be abridged only when more compelling objective appears, such as insuring fairness and uniformity in individual adjudication.

3. Criminal Law ⇐998(2)

Where alleged grounds for relief from criminal conviction were known at conclusion of trial and could have been, but were not, raised on direct appeal, collateral attack through posteonviction relief motion was not appropriate remedy. West's F.S.A. Rules Crim.Proc., Rule 3.850.

4. Criminal Law ⇐641.13(1)

Standard by which effectiveness of counsel is to be measured is whether counsel was reasonably likely to render and rendered reasonably effective assistance.

5. Criminal Law ⇐998(5)

To establish prejudice warranting postconviction relief, there must be serious doubt of defendant's guilt.

6. Criminal Law ⇐998(8)

Overwhelming nature of aggravating circumstances precluded likelihood that counsel's alleged omissions could have been prejudicial to postconviction relief petitioner.

7. Habeas Corpus ⇐85.5(11)

Where habeas corpus petitioner who asserted ineffective appellate counsel failed to meet his burden of showing substantial and serious deficiency measurably below that of competent counsel and failed to make sufficient showing that any of grounds alleged would have likely affected outcome of appeal, petition was denied.

Laurin A. Wollan, Jr., Tallahassee and Raymond W. Russell, Fort Lauderdale, for petitioner/appellant.

Jim Smith, Atty. Gen. and Joy B. Shearer, Asst. Atty. Gen., West Palm Beach, for respondent/appellee.

PER CURIAM.

We have for consideration an appeal from an order of the circuit court denying a motion for post-conviction relief, an original petition for writ of habeas corpus, and an application for stay of execution.

Petitioner Ford was convicted of murder in the first degree. A separate sentencing proceeding was held before the trial jury, which recommended that petitioner be sentenced to death. The trial judge, in accordance with the jury's recommendation, sentenced him to death. The judgment and sentence were affirmed by this Court. *Ford v. State*, 374 So.2d 496 (Fla.1979).

The Supreme Court of the United States denied a petition for writ of certiorari. *Ford v. Florida*, 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980).

Petitioner has also challenged his conviction by filing a habeas corpus proceeding in this Court, in which he joined 122 other persons under sentence of death, challenging this Court's purported review of extra record material in capital appeals. Relief was denied in *Brown v. Wainwright*, 392 So.2d 1327 (Fla.1981), *cert. denied*, — U.S. —, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981).

Petitioner further challenged his conviction and sentence in a motion for post-conviction relief filed in the circuit court. Petitioner has appealed from the order denying this motion for post-conviction relief. The state has filed a motion to quash this appeal and a motion to affirm the trial judge.

Petitioner has also filed with this Court a petition for writ of habeas corpus arguing that counsel for him failed to present to this Court meritorious issues relating directly to the validity of the conviction and sentence in this case and thereby deprived him of a meaningful direct appeal in contravention of the sixth, eighth, and fourteenth amendments to the Constitution of the United States. He asks that we grant him a belated appellate review from the judgment and death sentence of the trial court.

[1] Rule 3.850, Florida Rules of Criminal Procedure, authorizes the use of post-conviction relief procedures to challenge a once final judgment and sentence in limited instances, and for limited reasons. An error that may justify reversal on direct appeal will not necessarily support a collateral attack on the final judgment. *Witt v. State*, 387 So.2d 922 (Fla.1980), citing *U. S. v. Addonizio*, 442 U.S. 178, 99 S.Ct. 2235, 60 L.Ed.2d 805 (1979).

[2] Finality is an important element of the criminal justice system. This doctrine of finality should be abridged only when a more compelling objective appears, such as insuring fairness and uniformity in individual adjudication. *Witt v. State*.

[3] Petitioner's motion to vacate filed with the trial court alleged five grounds for relief. Only one of these—the claim of ineffective assistance of trial counsel—was properly raised. The other four issues pertaining to the admissibility of the confession, jury selection under *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), jury instructions during the sentencing phase, and the standard of proof used in the sentencing phase, were all matters known at the conclusion of the trial which could have been, but were not, raised on direct appeal. Accordingly, collateral attack through a Florida Rules of Criminal Procedure 3.850 motion was properly determined by the trial court not to be an appropriate remedy pursuant to this Court's decisions in *Witt v. State* and *Hargrave v. State*, 396 So.2d 1127 (Fla.1981). *See also Wainwright v. Sikes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

[4] The standard by which the effectiveness of counsel is to be measured is whether counsel was reasonably likely to render and rendered reasonably effective assistance. *Meeks v. State*, 382 So.2d 673 (Fla.1980). In *Knight v. State*, 394 So.2d 997 (Fla.1981), this Court set out a four-pronged test for determining whether there was reasonably effective assistance:

1. The specific act or omission upon which the claim is based must be detailed in the appropriate pleading.

2. The defendant has the burden to show it was a substantial and serious deficiency measurably below that of competent counsel.

3. The defendant has the burden to show that under the circumstances of his case, he was prejudiced to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceedings.

4. If the defendant shows this, the state may rebut by showing beyond a reasonable doubt that there was no prejudice in fact even if a constitutional violation was involved.

[5, 6] In his 3.850 motion to vacate petitioner presented four categories of "specific omissions" to support the claim of ineffectiveness of trial counsel: (i) failure to adequately present the motion to suppress petitioner's statement made to law enforcement officers after he indicated he wanted to consult an attorney, (ii) failure to adequately prepare for trial, (iii) failure to adequately present issues during the guilt phase of the trial, and (iv) failure to adequately present or preserve issues during the sentencing phase of the trial. After a careful review of the record of proceedings on the motion to vacate, particularly the testimony of the lawyer witnesses called by petitioner, we conclude that either the alleged deficiencies have not been demonstrated to be substantial and serious, measurably below conduct expected of competent counsel or that petitioner was not prejudiced to the extent that there is a likelihood that the deficient conduct affected the outcome of petitioner's trial. For example, insofar as the petitioner's statement is concerned, it is far from clear that the statement was inadmissible under the state of the law existing at the time of trial. *Witt v. State*, *Meeks v. State*. Furthermore, petitioner's statement only admitted his presence and participation in the robbery. It denied participation in the shooting. There was abundant evidence apart from the confession, some by eye witnesses, to place him at the scene as a participant. Even disregarding petitioner's confession there was overwhelming evidence of guilt. To establish prejudice, there must be a serious doubt of the defendant's guilt. *Canary v. Bland*, 583 F.2d 887, 894 (6th Cir. 1978). To the same extent the purported deficiencies at the sentencing phase can be readily attributed to tactics of counsel under the circumstances of the case. In any event, the overwhelming nature of the aggravating circumstances precludes any likelihood that counsel's alleged omissions could have been prejudicial to petitioner.

Accordingly, applying the standard of *Meeks* and *Knight* we agree with the finding of the trial court that "the assistance of his counsel was . . . as effective as it could have been expected to be done under these circumstances."

[7] Petitioner raises the following grounds in asserting ineffective appellate counsel in his petition for writ of habeas corpus: (i) failure to raise the issue of denial of assistance of counsel during interrogation, (ii) failure to raise denial of petitioner's right to a fair and impartial jury under *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), (iii) failure to attack the adequacy of the trial court's instruction to the jury at the sentencing phase, (iv) failure to challenge findings of aggravating and mitigating circumstances, and (v) failure to appeal non-disclosure of a witness. Applying the four-pronged test of *Knight v. State* to each of these claims, we find that petitioner has failed to meet his burden of showing a substantial and serious deficiency, measurably below that of competent counsel. Even if we assumed this aspect of the *Knight* test were met, there is not a sufficient showing that any of these grounds would likely have affected the outcome of the appeal.

The order of the trial court denying the motion to vacate is affirmed, the petition for writ of habeas corpus is denied, and the application for stay of execution is denied. No petition for rehearing will be entertained.

SUNDBERG, C. J., and ADKINS, BOYD, OVERTON, ALDERMAN and McDONALD, JJ., concur.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 81-6663-Civ-NCR

ALVIN BERNARD FORD

Petitioner

-vs.-

CHARES G. STRICKLAND, JR., etc., et al

Respondents

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The facts are presented in terse form in the opinion of the Supreme Court of the State of Florida, as follows:

> On the morning of July 21, 1974, Ford and three others, who had decided to commit a robbery, went with weapons to a Red Lobster Restaurant in Fort Lauderdale, Florida. During the robbery, after two people had escaped from the restaurant, Ford's three accomplices realized the police would soon arrive and so left the scene of the crime. Ford remained in order to effectuate the theft of some $7,000 from the restaurant's vault and was confronted by Officer Dimitri Walter Ilyankoff of the Fort Lauderdale Police Department. Ford shot the policeman three times, wounding him fatally. Appellant escaped in the decedent's police car, and his fingerprints were later found in the vehicle after it had been abandoned. He was arrested in the vicinity of Gainesville, Florida, and was returned to Fort Lauderdale for indictment and trial.

Ford v. State, 374 So. 2d 496, 497 (Fla. 1979).

The Supreme Court of Florida did not go into much detail and, as stated in the Supreme Court's opinion, the circumstances of the killing are somewhat less than explicit. What happened was that Ilyankoff arrived on the scene and was shot twice in the abdomen without warning. While lying outside the back door of the Red Lobster Restaurant, defendant Ford then ran out of the restaurant to the police cruiser, apparently realizing that his accomplices had left in the escape vehicle without him. There were no keys in the

cruiser so Ford returned to the police officer. Ilyankoff had, in the meantime, radioed for assistance and had struggled in an effort to get up. Defendant ran back to the police officer and asked him for his keys. Ilyankoff then was shot in the back of the head, at close range by defendant Ford; at that point Ford took the keys and escaped in the police cruiser at high speed. Not only was there an eye witness, an employee of the restaurant cowering in a utility room at the back of the restaurant observing it all through a slatted door only about five feet from the officer, but Ford's movements were seen by a nearby resident and the call for help was, of course, heard on the radio as well as taped. It seems unnecessary to go into more elaborate details about the slaying or the corroborating evidence for purposes of this order.

FINDINGS AND CONCLUSIONS

Defendant is present, counsel are present.

I am going to take the issues as they were raised in the petition for writ of habeas corpus filed by the defendant below and petitioner in this court, in the case of Alvin Bernard Ford versus Charges G. Strickland, et al., 81-6663-Civ-NCR.

The first issue raised was the issue of confrontation of witnesses. The ground asserted is that the petitioner was denied the right to confront witnesses, and the court finds no merit in that contention, for a number of reasons.

The opportunity existed for the defendant to call Ms. Buchanan in this case as a witness. Whether or not defense counsel would have been successful in treating Ms. Buchanan

as an adverse witness, of course, is problematical, and I shall not indulge in speculation as to that ruling, nor do I find it would rise to the constitutional level required for the issuance of the writ, even if the state trial court's ruling was wrong. Besides, the matter has been treated additionally by the Supreme Court of Florida in its holding.

I emphasize again this court does not sit as an appellate tribunal to review the findings of the Supreme Court of Florida or to second-guess the trial court judge, but only in the area prescribed by the Congress under 28 U.S.C. § 2254.

As to the alleged issue of the non-disclosure of exculpatory evidence, I can't find in this record that the defendant has carried the burden in the slightest on this point.

I might add Ms. Buchanan was found by the Supreme Court of Florida to be impeached. Ford v. State, 374 So. 2d 496, 499 (Fla. 1979). That applies, I think, not only to issue A but certainly has some bearing on issue B. But there's been a total failure on the part of the defendant to carry this point, issue B.

Issue C is the claimed denial of the right to assistance of counsel in connection with the Miranda warnings.

In the first place, it was not a statement as to doing the shooting in connection with the robbery but only as to the robbery. There was such an overwhelming amount of evidence establishing the complicity of the defendant in the robbery at the Red Lobster that it would have been harmless error by any standard. Additionally, Wainwright v. Sykes, 433 U.S. 72 (1977) applies.

The allegation of ineffective assistance of counsel isn't cause under Lumpkin v. Ricketts, 551 F.2d 680, 682-83 (5th Cir. 1977). This court does not find a showing of ineffective counsel on this point. Mr. Adams raised it in the motion to suppress and he lost the ruling.

Neither does the court find that Edwards v. Arizona, 101 S. Ct. 1880 (1981), should be applied retroactively. Miranda wasn't and there seems no reason to do so from its progeny. Miranda v. Arizona, 384 U.S. 436 (1966). No persuasion has been presented that such should be the case, and the court rejects that argument. That point is without merit.

Issue D relates to the claim of a Witherspoon violation. Witherspoon v. Illinois, 391 U.S. 510 (1968). Judge Lee went over this matter more than once with the jury. To be sure, it probably would have been better if he had conducted inquiries with each juror individually. As counsel suggested at the hearing Saturday, we probably wouldn't even have the issue before us had he done so. Perhaps with hindsight he would have done it differently.

It will be six years on Wednesday since this trial commenced and the jury was selected; I think that ought to be considered by all courts at this stage in evaluating what happened then. Was what the trial judge did during the voire dire such error as to require the issuance of the writ? This court doesn't find so. The court finds that Witherspoon was substantially complied with. Again, Wainwright v. Sykes, 433 U.S. 72 (1977), applies and the court does not find ineffective assistance of counsel in that regard.

In the sentencing phase instructions to the jury, here again Wainwright v. Sykes controls. The court does not find ineffective assistance of defendant's counsel in this matter.

Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981), was decided in September, just prior to the split of the circuits with a very vigorous -- vehement, I should say -- dissent by Judge Coleman. Id. at 1378. However, petition

for rehearing en banc was denied four days ago. Whether or not that was influenced by the split of the circuits is a matter of no relevance to this court.

At first blush it would appear that the instruction given in Washington v. Watkins was in the same format as that given in this case. Id. at 1367-68. I frankly am somewhat puzzled by the majority decision in Washington v. Watkins, but they decided and I accept it. However, I think there is a valid distinction: Mississippi has sentencing by a jury, or at least a jury makes a binding sentence recommendation; Florida does not. Florida has sentencing of death by a judge and the jury's verdict is only advisory.

The Eleventh Circuit in Henry v. Wainwright, No. 80-5184 (11th Cir. Nov. 12, 1981), supports the court's conclusion in this regard. Henry does not fit this case on the merits because at the Henry trial there was sanctioning of this jury's consideration not only of the statutory aggravating factors but anything else the jury determined to be aggravating. Id. slip op. at 12914-15. That was not the situation in the instant trial at all.

It is significant that in Henry v. Wainwright, Judge Reed in the Middle District, granted the writ if the state trial court failed to provide a second sentencing within 90 days of the court's order. Id. slip op. at 12913. The Eleventh Circuit affirmed the judgment of the District Court.

Let's look at the record in the instant case because it applies to that. For example, Judge Lee concluded in 1975 that: "There are sufficient and great aggravating circumstances which exist to justify the sentence of death. Indeed, it is difficult to imagine a crime which is more heinous, atrocious and cruel and under our existing law it is deserving of no sentence but death." Ford v. State, 374 So. 2d 496, 502 n.1 (Fla. 1979).

Less than two weeks ago, November 25, 1981, at the hearing on motion for post-conviction relief, after the rendering of these opinions, Judge Lee stated at page 249 of that hearing transcript:

> I am satisfied on the presentation here today that the evidence was overwhelming of Mr. Ford's guilt, that he was guilty then and he remains guilty now, and that the imposition of the death sentence was then and is now a proper one to have imposed, and indeed the facts of the case allowed for none other.

Even if the court assumed that Washington v. Watkins compelled the issuance of the writ; the authority of Henry would indicate granting the writ if the state trial court failed to provide a second sentencing hearing within ninety days. Such an order would, in view of Judge Lee's comments only twelve days ago, be a straining of federalism to an extreme degree. Frankly, it would almost be an insult to Judge Lee. Judge Lee certainly deserves no such insult. Just as equity does not require a vain act to be done, I see nothing in view of these circumstances that would dictate that such a vain procedure be required of Judge Lee. Consequently, the court finds no merit in issue E.

Issue F claims an unconstitutional shifting of the burden at the penalty phase of the trial.

I must say petitioner must not have thought much of this point; he only gave seven-and-a-half lines to it in the petition. I don't think much of it, either. I think Proffitt v. Florida, 428 U.S. 242 (1976) is sufficient itself to reject the claim.

Issue G is a claim that the Florida Supreme Court failed to set aside the death sentence despite the substantial erosion of the basis for the death sentence. Here again,

I can't find that the Supreme Court of Florida ignored, or that the sentencer ignored, non-statutory mitigating factors. Even though some of the aggravating factors were set aside by the Supreme Court of Florida in its opinion, still the determination of that matter on aggravating/mitigating factors was rejected by the Supreme Court of the United States in Proffitt v. Florida, 428 U.S. at 255.

That will also apply to issue H, the alleged failure of the Supreme Court of Florida to assure imposition of the death penalty fairly and consistently. All defendant is doing here is quarreling with the Florida Supreme Court; that doesn't rise to a constitutional basis. It is rejected on the basis not only of Proffitt, but also the Fifth Circuit case of Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), where the court referred to the Supreme Court of Georgia stating that "The Supreme Court of Georgia is the ultimate authority on the law of Georgia and we are not permitted to question its interpretation of that State's statutes. We must therefore treat [aggravating] circumstance (2) as it is interpreted by the Georgia Supreme Court." Id. at 405-06 (citations omitted). So must this court as to the Florida Supreme Court.

Issue I, the alleged Florida Supreme Court practice of reviewing psychiatric material or other material with reference to the defendant without the defendant or the defendant's attorney being aware of it.

One, this is nothing but speculation that such occurred in the defendant's file. There's been no evidence presented and admittedly by defendant none could be. There were no letters of transmittal or anything at all to suggest that such material existed in the petitioner's file -- only

that it existed in other files. Therefore defendant asked this court to speculate that the Supreme Court of Florida had done similarly in petitioner's case, as well. Well, it clearly is without merit.

Additionally, defendant was one of a class of plaintiffs who sued the Supreme Court on this. They lost and certiorari was denied by the United States Supreme Court on November 2, 1981. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981), cert. denied, No. 80-6434 (Nov. 2, 1981).

We then move to the alleged ineffective assistance of counsel matter which was heard today. Let me first state this about defendant's trial lawyer, Mr. Adams. Perhaps it is a little difficult for a judge to evaluate effective assistance of counsel in a vacuum, especially when the judge has had that lawyer practice before him, has observed him in action, knows not only from observation but also by reputation of the lawyer's skill in criminal defense matters.

The court has always found Mr. Adams to be extremely effective counsel versed in the law and one who never forgets that the purpose is to win, if I may put it that way, in the trial court while at the same time preserving as is necessary matters for any appellate review.

One might be a little more critical of someone such as one of the lawyers called as defense witnesses before Judge Lee, who had only tried one criminal case; that lawyer was called to criticize Mr. Adams' representation which is among the most classic instances of Monday morning quarterbacking I have ever seen. The court simply does not have perhaps the same willingness to nitpick and flyspeck the actions or inactions of defendant's counsel because of the court's own observations; in fact, the court will take judicial notice

of the experience of Mr. Adams. Additionally, the record is replete today with his background. A trial attorney has other things in mind called trial tactics, rather than fighting every little battle that can be fought throughout a proceedings. It is easy for lawyers to sit back six years later and say this "i" wasn't dotted, that "t" wasn't crossed just so or the slant of the crossing could have been better. That's hardly ineffective assistance of counsel. And that is the way most of the questioning has struck me today.

I must say I am glad that I had this evidentiary hearing. on Saturday, I concluded there was no reason to have it. The more I heard today, the more convinced I was of that. I shall enumerate:

The three witnesses set forth in the transcript of the post-conviction state court hearing basically boil down to this: Mr. Jepeway's describing Mr. Adams' representation as inadequate, but admitting the hadn't read the transcript. He didn't know what the Miranda statement was that he was complaining about having been admitted; if he had, he would have been aware that the statement was only as to the robbery and the defendant denied any involvement with the murder. The things Mr. Jepeway didn't know were rather significant.

The second lawyer who was called had only one criminal case in the way of experience. The lack of qualification of this witness makes "expert" status dubious in that type of hearing. In any event, the lack of qualification would cause an excess of ninety-nine percent discount of the opinion.

The third one, Mr. Von Zampft, had read the transcript, and has some experience; he presented more credible second-guessing. However, even he concluded representation of defendant to satisfy his criticism would have made no difference on the question of guilt or innocence. In other

words, even the defendant's most credible expert concluded at the post-conviction relief hearing, some six years after the trial, the defendant would still have been guilty. This represents a rather obvious recognition of the overwhelming mass of evidence against the defendant. He did think it might have made a difference in the jury recommendation. That's pure speculation, of course.

In view of Judge Lee's findings, both shortly after the trial in 1975 and again two weeks ago, to speculate that the jury would have come back with a different recommendation and then speculate that Judge Lee would have changed his sentence is not just inference on inference, it's speculation on top of speculation.

I think it is significant at this point to point out that Judge Lee has been a judge in criminal court matters for many years; practiced criminal law before that, for several years as a criminal defense lawyer, as I recall; and he was a judge of several years' experience at the time this case was tried. Just two weeks ago, he indicated that this is the only time he ever imposed the death sentence.

For the benefit of the Court of Appeals, because they don't live in this community, I think it is safe to say that Judge Lee does not have a reputation as a "hanging judge," whatever that phrase may mean in the public eye, but he does have a reputation as a good judge. The imposition of the death sentence in only this one instance, this case, is significant.

As to the first witness this morning, the pathologist's testimony is rather interesting altho it didn't seem to square with other testimony in the trial. For example, the fact that several minutes elapsed in all this. The defendant

shot Officer Ilyankoff without provocation or warning twice in the stomach; and while he's lying on the ground, the defendant went out to the cruiser because then he needed an escape vehicle; he came back to the officer but in the meantime the officer had called for help three times on his radio; the officer had tried to climb to an upright position. A conversation ensued, albeit brief, between the defendant and Officer Ilyankoff. It was brief because the defendant only wanted the keys to the police cruiser from Officer Ilyankoff. It was also brief because the defendant shot the officer in the back of the head at fairly close range.

The charge before me is that the failure to call Dr. Fatteh was ineffective assistance of counsel. I found most persuasive and credible the testimony of the defense attorney, Mr. Adams, that he didn't want to reinforce all of this in the jury's mind. I agreed with that when he said it because I had already concluded that. I think it would have insulted the intelligence of the jury to present this testimony and then argue that this matter was not atrocious or heinous, just as I frankly felt it insulted my intelligence to present it.

Additionally, Dr. Embry, the medical examiner and a pathologist, performed the autopsy and testified about it.

As more questions were asked of Mr. Adams, the weaker the claim of ineffective assistance of counsel became. It clearly came as a distinct surprise to defendant's lawyers in this court when they were trying to challenge Mr. Adams as to his alleged failure to cross examine Ms. Buchanan, the eye witness, on her having once said that she could only see the lower half of the defendant, when they learned that Mr. Adams had gone out and examined the door. He was doing his best not to let the jury find out that you could clearly see from behind that door. Good trial tactics dictate obviously that the jury be left wondering if one can really

see from inside a louvered door. That's the mark of an experienced trial lawyer.

Dr. Amin's testimony was presented with respect to the claim of ineffective assistance of counsel. I assume Dr. Amin is not trying to corner the market in any capital case where a defendant happens to be black, because Dr. Amin indicated he was the only black psychiatrist in Florida with forensic experience. The basic thrust I could find from the presentation of this evidence was that only a black psychiatrist would have sufficient socio-cultural compatability with this defendant to properly present this in court. I find that is a classic example of reverse racism and bigoted on its face. I would not find such an argument meritorious whether the argument were made in this situation or a reverse situation or in any other analagous situation involving a different racial, or religious, or gender background between the psychiatrist testifying and the defendant.

One could argue with as much force that Dr. Taubel's testimony would be received more favorably by the jury in this case and the judge in this case because he was of the same race. Obviously, that argument is specious as well. I use it only for an example of how vacuous that argument is as presented by the defendants, or at least as I assume the thrust of it to be.

In any event, Dr. Taubel testified. We are talking about December, 1975, six years ago. Dr. Taubel was certainly one of the leading, if not the leading forensic psychiatrist in this community at that time. If calling such a witness amounts to ineffective assistance of counsel, then the law has come to an exotic state quite foreign to my awareness.

As to character witnesses, I note that both the mother and girl friend of the defendant were called at the sentencing phase. I find no substance to a claim of ineffective assistance of counsel as a result of that.

I might say that I think a number of people need to be commended in this matter: Judge Lee, Mr. Satz, our present State Attorney, who was the assistant state attorney who prosecuted this matter, and Mr. Adams, whom I think did a good job.

There are certain matters that the public might wonder about, and I understand why they might. For example, why a case that was tried in December of 1975 didn't get reviewed on this basis until December of 1981. I don't know why the Supreme Court of Florida took three-and-a-half years. I don't know why it took another couple of years for the death warrant to be issued. And I don't know why the Congress of the United States doesn't enact the law that has been introduced setting forth a time limitation within which these writs of habeas corpus must be instituted. If they had, we wouldn't be here on a crash basis.

I was determined I was going to rule on this matter on the merits if I possibly could within the time allowed and I felt from the beginning that was likely to be the case. If at any time I had thought I couldn't finish, I would have stayed the matter. There would have been no choice.

It is true; defendant has a right to appellate review of this court's findings. I iterate that I shall examine the transcript when it's prepared and undoubtedly modify, perhaps amplify wherever this court deems necessary in an effort to provide an order of more assistance to the Eleventh Circuit. I trust they will recognize that it's not as

polished as it might have been. I did not want to delay ruling because I did not want this court to be responsible for any further delay in the matter which has been delayed for too long. Rather clearly, when a crime as heinous and as reprehensible as this one as presented to the jury as in this case, then the execution should have been carried out a long time ago. Society deserves no less.

The court's formal finding and conclusion is that the petition for writ of habeas corpus is without merit; it is denied; and the motion for stay is denied.

I have discussed the matter with a judge in the Eleventh Circuit and advised him after the evidence was concluded and arguments have been waived that I had arrived at a conclusion, and informed him of it. He advised that the Court of Appeals would give me time to announce my findings and conclusions from the bench, and then enter a stay in order to permit the defendant to receive an effective appellate review. Apparently, that may well have been done. The execution scheduled for tomorrow morning, I'm advised, has been stayed by the Eleventh Circuit.

The burden is upon the Attorney General's Office of the State of Florida to notify the warden of that. It is not on this court. The Court of Appeals made it abundantly clear that this administrative matter had to be carried out because they were concerned that if they issued the stay after 5:00 o'clock, there might be some difficulty in making sure that the stay was effectively communicated to the warden. That, of course, the Attorney General's Office can do, and I direct that you do that.

WHEREFORE, the petition is denied and the motion for stay is denied.

DONE AND ORDERED this 10 day of December, 1981.

U. S. District Judge

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time prior to defendant's possession." *United States v. Laymon*, 621 F.2d 1051, 1054 (10th Cir. 1980). The Government's proof satisfied this burden under section 1201(a)(1).

The judgment below is affirmed.

Alvin Bernard FORD, Petitioner,

v.

Charles G. STRICKLAND, Jr., Warden, Florida State Prison; Louie L. Wainwright, Secretary, Department of Offender Rehabilitation, State of Florida; Jim Smith, Attorney General, State of Florida, Respondents.

No. 81-6200.

United States Court of Appeals, Eleventh Circuit.

April 15, 1982.

Rehearing Granted April 28, 1982.

Florida prisoner, who had received the death sentence, sought federal habeas relief. The United States District Court for the Southern District of Florida, Norman C. Roettger, Jr., J., denied relief, and petitioner appealed. The Court of Appeals, Roney, Circuit Judge, held that: (1) failure to appeal state trial court's denial of motion to suppress confession precluded consideration of the issue in federal habeas proceedings; (2) there was no constitutional error in instructing jury as to all aggravating and mitigating circumstances; (3) instructions did not improperly preclude consideration of nonstatutory mitigating factors; (4) petitioner failed to establish ineffective assistance of counsel at sentencing; and (5) Florida Supreme Court's reviewing extra-record material in connection with death row inmates other than petitioner would not render petitioner's death sentence unconstitutional.

Affirmed.

Kravitch, Circuit Judge, concurred in part and dissented in part and filed opinion.

1. **Criminal Law** ⇐998(3)

Florida defendant's failure to raise an issue which could be asserted on direct appeal precludes consideration of the issue on a motion for postconviction relief. West's F.S.A. Rules Crim.Proc., Rule 3.850.

2. **Habeas Corpus** ⇐45.3(1)

A state prisoner can forego the opportunity to raise constitutional issues in habeas corpus by deliberately bypassing state appellate procedural rules or by merely failing to follow them without showing both cause for the default and prejudice resulting therefrom. 28 U.S.C.A. § 2254.

3. **Habeas Corpus** ⇐25.1(1)

For purpose of *Sykes*, i.e., that absent showing of both cause for noncompliance and actual prejudice habeas corpus relief is barred because of procedural default in state proceedings, "cause" is defined in light of a determination to avoid a miscarriage of justice, while "prejudice" means actual prejudice. 28 U.S.C.A. § 2254.

See publication Words and Phrases for other judicial constructions and definitions.

4. **Habeas Corpus** ⇐25.1(8)

The *Sykes* exception to bar on federal habeas relief where state petitioner fails to comply with a state procedural rule did not encompass Florida prisoner's failure to appeal trial court's denial of motion to suppress confession and imposition of *Sykes* forfeiture rule did not constitute a miscarriage of justice as petitioner did not contest accuracy of his statement, which admitted only presence and participation in robbery but denied participation in fatal shooting. 28 U.S.C.A. § 2254.

5. **Homicide** ⇐354

That evidence was insufficient to support two aggravating circumstances and that one aggravating circumstance was

based on the same aspect of the crime as another did not compel the conclusion that Florida death sentence was unconstitutionally infected by consideration of extraneous evidence where there were no statutory mitigating circumstances and the sentencer considered only constitutional statutory aggravating circumstances and the properly found aggravating circumstances sufficiently supported the sentence. West's F.S.A. § 921.141.

6. Homicide ⇨311

Florida trial court did not constitutionally err in instructing jury as to all aggravating and mitigating circumstances permitted by death penalty statute. West's F.S.A. § 921.141.

7. Habeas Corpus ⇨96

In evaluating state court's death penalty instructions federal habeas court paid careful attention to the words actually spoken to the jury to determine the interpretation that a reasonable juror might give the instruction in question and examined the entire charge to discern whether the issues and law presented were adequate. West's F.S.A. § 921.141; 28 U.S.C.A. § 2254.

8. Habeas Corpus ⇨45.2(4)

Where some deficiency exists in language of death penalty charge taken as a whole it must be shown that it so infected the entire trial process that a due process violation occurred, before federal habeas relief is warranted. West's F.S.A. § 921.141; U.S.C.A.Const.Amend. 14.

9. Homicide ⇨311

Although in instructing on aggravating circumstances the trial court stated that the jury was to consider "only the following" and, with regard to mitigating circumstances, stated "you shall consider the following," with the court reading the appropriate statute in both instances, such instructions did not improperly preclude consideration of nonstatutory mitigating factors for death penalty purposes; it was reasonable to conclude that trial judge's perception that nonstatutory factors could be considered was conveyed to the advisory jury. West's F.S.A. § 921.141; U.S.C.A.Const. Amend. 14.

10. Homicide ⇨354

Crime of capital murder in Florida does not include the element of mitigating circumstances not outweighing aggravating circumstances; aggravating and mitigating circumstances are not facts or elements of the crime but, rather, they channel and restrict the sentencer's discretion in a structured way after guilt has been fixed. West's F.S.A. § 921.141.

11. Homicide ⇨354

Existence of aggravating or mitigating circumstances is a fact susceptible to proof under a reasonable doubt or a preponderance standard whereas the relative weight of the circumstances is not, and process of weighing such circumstances is a matter for the judge and jury in a death penalty case and, unlike facts, it is not susceptible to proof by either party. West's F.S.A. § 921.141.

12. Habeas Corpus ⇨92(1)

Where in a capital punishment case state courts act through a properly drawn statute with appropriate standards to guide discretions, federal courts will not undertake a case-by-case comparison of the facts in a given case with the decisions of the state Supreme Court, even though if the federal court were to retry the aggravating and mitigating circumstances it might at times reach different results. West's F.S.A. § 921.141; 28 U.S.C.A. § 2254.

13. Federal Courts ⇨386

Florida Supreme Court is the ultimate authority on Florida law and a federal habeas court does not sit to question the Florida court's interpretation of Florida statutes. 28 U.S.C.A. § 2254.

14. Habeas Corpus ⇨92(1)

In reviewing ineffective assistance of counsel claims, a federal habeas court does not sit to second-guess considered professional judgments with the benefit of 20/20 hindsight. U.S.C.A.Const.Amend. 6.

15. Criminal Law ⇨641.13(1)

That an attorney's strategy may appear wrong in retrospect does not automati-

cally mandate constitutionally ineffective representation. U.S.C.A.Const.Amend. 6.

16. Criminal Law ⇐641.13(6)

That defense counsel has not pursued every conceivable line of inquiry does not constitute ineffective assistance of counsel. U.S.C.A.Const.Amend. 6.

17. Criminal Law ⇐1134(2)

Florida Supreme Court's reviewing nonrecord material in connection with death row inmates other than petitioner would not render petitioner's death sentence unconstitutional, as function of the Florida court is to review sentences for procedural regularity and proportionality and the court does not impose sentence. West's F.S.A. § 921.141; U.S.C.A.Const. Amend. 14.

18. Habeas Corpus ⇐85.1(2)

In face of Florida prisoner's unsupported allegations that the state court viewed extra-record material in affirming conviction and sentence, federal habeas court accorded a presumption of correctness to the Florida court's statement that its members properly performed their procedural appellate function in reviewing death sentences. West's F.S.A. § 921.141; 28 U.S.C.A. § 2254(d).

19. Habeas Corpus ⇐92(1)

Reviewing material extraneous to the record is not a practice to be condoned either by a trial level or appellate court.

Richard H. Burr, III, Nashville, Tenn., Marvin E. Frankel, New York City, for petitioner.

Joy B. Shearer, Asst. Atty. Gen., W. Palm Beach, Fla., for respondents.

Appeal from the United States District Court for the Southern District of Florida.

Before RONEY and KRAVITCH, Circuit Judges, and PITTMAN *, District Judge.

* Honorable Virgil Pittman, U. S. District Judge for the Southern District of Alabama, sitting by designation.

RONEY, Circuit Judge:

Alvin Bernard Ford was charged with shooting a wounded policeman in the back of the head at close range while fleeing from an armed robbery. Convicted of murder, Ford was sentenced to death in Florida. He appeals the denial of a petition for writ of habeas corpus alleging essentially seven contentions: (1) improper admission of an oral confession, (2) failure of the Florida Supreme Court to require resentencing when it found three of the statutory aggravating circumstances unsupported by the evidence; (3) improper state trial court instructions on mitigating circumstances; (4) failure of the Florida death law to require a finding that aggravating circumstances must outweigh mitigating circumstances beyond a reasonable doubt; (5) failure of the Florida Supreme Court to apply a consistent standard of reviewing the aggravating and mitigating circumstances in the case; (6) ineffective assistance of counsel at sentencing; and (7) review by the Florida Supreme Court of nonrecord materials in death cases, the so-called *Brown* issue. After examining each of these contentions carefully, we affirm the denial of the writ of habeas corpus.

Briefly, the facts giving rise to petitioner's conviction and sentence are as follows. On the morning of July 21, 1974, Ford and three accomplices entered a Red Lobster Restaurant in Fort Lauderdale, Florida, to commit an armed robbery. During the course of the robbery, two people escaped from the restaurant. Fearing police would soon arrive, petitioner's accomplices fled. Ford remained to complete the theft of approximately $7,000 from the restaurant's vault.

Officer Dimitri Walter Ilyankoff arrived on the scene. Petitioner allegedly shot him twice in the abdomen and, apparently realizing his accomplices had abandoned him, ran to the parked police car. Because there were no keys in the car, Ford ran back to

the struggling, wounded officer. Petitioner asked Officer Ilyankoff for the keys and then allegedly shot him in the back of the head at close range. Ford took the keys and made a high speed escape.

Petitioner was convicted in Circuit Court, Broward County, Florida, of first degree murder. In accordance with the jury's recommendation, the trial judge sentenced him to death. On direct appeal, both the conviction and sentence were affirmed. *Ford v. State*, 374 So.2d 496 (Fla.1979). The United States Supreme Court denied Ford's petition for writ of certiorari. *Ford v. Florida*, 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980).

Petitioner thereafter joined with 122 other death row inmates in filing an application for extraordinary relief and petition for writ of habeas corpus in the Florida Supreme Court. The petitioners challenged the court's practice of receiving nonrecord information in connection with review of capital cases. The Florida Supreme Court dismissed the petition, *Brown v. Wainwright*, 392 So.2d 1327 (Fla.1981), and the United States Supreme Court denied certiorari, *Brown v. Wainwright*, ___ U.S. ___, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981).

Ford then filed a motion for post-conviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure and applied for a stay of execution. Relief was denied. *Ford v. State*, 407 So.2d 907 (Fla. 1981).

Finally, petitioner filed a petition for writ of habeas corpus under 28 U.S.C.A. § 2254 in the United States District Court for the Southern District of Florida. The district court denied relief, and we granted a stay of execution so that the issues raised could be reviewed on appeal.

I.

Admission of Ford's Oral Confession

Ford was arrested in Gainesville, Florida on the day of the murder. He refused to talk with Gainesville police officers, indicating he first wanted to consult a lawyer. He was given an opportunity to talk to a public defender, but refused to accept that representation. He was unable to reach his private attorney.

Fort Lauderdale police officers came to return Ford to Fort Lauderdale. The *Miranda* warnings were given and petitioner "wanted" to talk but would not give a written statement until he had contacted his lawyer. Petitioner's only statement at the time was "I didn't shoot that cop." On a small plane from Gainesville to Fort Lauderdale, another officer gave Ford *Miranda* warnings. Ford said he was willing to talk but would give no written statement until he had talked with his lawyer. After informing a Fort Lauderdale officer of his earlier unsuccessful effort to contact his attorney and his refusal of representation by the public defender, petitioner admitted participating in the Red Lobster robbery. Although denying participation in the killing, he admitted being left behind at the Red Lobster by his accomplices, seeing a police officer lying on the ground as he left the restaurant, and escaping in the police car which he abandoned for a green Volkswagen.

Ford claims admission of the above statement in his trial violated the Fifth, Sixth and Fourteenth Amendments and was contrary to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and its progeny, including *United States v. Priest*, 409 F.2d 491 (5th Cir. 1969),[1] and *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). He argues that having invoked without waiving his right to counsel, his responses to subsequent police-initiated custodial interrogation without an attorney should not have been admitted into evidence.

Petitioner moved to suppress his confession, but failed to appeal the trial court's denial of his motion on direct appeal to the Florida Supreme Court. Based on *Wain-*

1. The Eleventh Circuit, in the en banc decision *of Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981), adopted as precedent the decisions of the former Fifth Circuit, decided prior to October 1, 1981.

wright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), the district court held Ford's failure to raise the issue on direct state appeal forecloses its consideration in this habeas corpus proceeding.

[1] The Florida procedural law is clear. A criminal defendant's failure to raise an issue which could be asserted on direct appeal precludes consideration of the issue on a motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850. *Hargrave v. State*, 396 So.2d 1127 (Fla. 1981). Accordingly, the state courts refused to consider this contention concerning the confession.

In *Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963), the Supreme Court held a state prisoner who knowingly and deliberately bypasses state procedures intentionally relinquishes known rights and can be denied habeas corpus relief on that basis. Recognizing *Fay* left open the possibility of "sandbagging" by defense lawyers, the Supreme Court narrowed its sweeping rule in *Wainwright v. Sykes*, 433 U.S. 72, 89, 97 S.Ct. 2497, 2507, 53 L.Ed.2d 594 (1977). The Court held that absent a showing of both cause for noncompliance and actual prejudice, habeas corpus relief is barred where a state prisoner has failed to comply with a state contemporaneous objection rule. 433 U.S. at 87, 97 S.Ct. at 2506.

While *Sykes* arose in the context of a procedural default at the trial level, we have applied its rationale in cases involving a procedural default during the course of a direct appeal from a state court conviction. *See Huffman v. Wainwright*, 651 F.2d 347 (5th Cir. 1981); *Evans v. Maggio*, 557 F.2d 430, 433–34 (5th Cir. 1977). Other circuits have applied *Sykes* in the same fashion. *See Forman v. Smith*, 633 F.2d 634, 640 (2d Cir. 1980); *Cole v. Stevenson*, 620 F.2d 1055 (4th Cir. 1980); *Gibson v. Spalding*, 665 F.2d 863, 866 (9th Cir. 1981). Applying *Sykes* in this setting accrues the dual advantage of discouraging defense attorneys from omitting arguments in preparing appeals with the intent of saving issues for federal habeas corpus consideration and encouraging state appellate courts to strictly enforce procedural rules, thereby reducing the possibility the federal court will decide the constitutional issue without the benefit of the state's views. *Gibson v. Spalding*, 665 F.2d at 866; *Wainwright v. Sykes*, 433 U.S. at 90, 97 S.Ct. at 2508. Additionally, application of *Sykes* to the forfeiture of specific claims on appeal promotes the goals of comity and accuracy identified by the *Sykes* Court. *Forman v. Smith*, 633 F.2d at 639.

[2] Thus, in this Circuit a state prisoner can forego the opportunity to raise constitutional issues in habeas corpus proceedings by deliberately bypassing state appellate procedural rules *or* by merely failing to follow them without showing both cause for the default and prejudice resulting from it. Because this record does not reveal Ford's procedural default was the result of an intentional bypass within the meaning of *Fay*, we turn to the cause and prejudice exception of *Sykes*.

[3] Cause and prejudice are sometimes interrelated. *Huffman v. Wainwright*, 651 F.2d at 351. While the Supreme Court has not explicitly defined cause and prejudice, our precedents have defined "cause" sufficient to excuse a procedural default in light of the determination to avoid "a miscarriage of justice." *Id.* Prejudice means "actual prejudice" which in this case must result from the failure to appeal the trial court's admission of petitioner's statement. *See Francis v. Henderson*, 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976); *Buckelew v. United States*, 575 F.2d 515, 519 (5th Cir. 1978).

[4] A careful review of the record reveals the *Sykes* exception does not apply in this case. Ford's argument that the procedural default is excused because of the position of Florida courts at the time on the issue must fail. The claim was perceived and asserted in the trial court, and therefore could have been asserted on appeal. *Engle v. Isaac*, — U.S. —, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982).

If a defendant perceives a constitutional claim and believes it may find favor in

the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim. Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid. Allowing criminal defendants to deprive the state courts of this opportunity would contradict the principles supporting *Sykes*.

— U.S. at —, 102 S.Ct. at 1572 (footnotes omitted).

Even addressed in terms of manifest injustice, *see Huffman v. Wainwright*, 651 F.2d 347 (5th Cir. 1981), under the circumstances of this case, imposition of the *Sykes* forfeiture rule does not constitute a miscarriage of justice. Petitioner does not contest the accuracy of the statement made to the Fort Lauderdale police. The statement admitted only [illegible]nce and participation in the robbery, [illegible]ed participation in the shooting. The Florida Supreme Court, in discussing effectiveness of counsel, concluded and we agree that "[t]here was abundant evidence apart from the confession, some by eyewitnesses, to place him at the scene as a participant." *Ford v. State*, 407 So.2d at 909.

II.

Failure to Require Resentencing When Evidence Insufficient on Some Aggravating Circumstances

After receiving instructions on the eight aggravating circumstances under Fla.Stat. § 921.141, Ford's jury recommended the death penalty. Finding evidentiary support for all eight aggravating circumstances, the judge sentenced petitioner to death. On appeal, the Florida Supreme Court ruled three of the eight did not apply because two lacked evidentiary support and one was based on the same aspect of the crime as another circumstance. *Ford v. State*, 374 So.2d 496, 501-03 (Fla.1979). The court upheld the five other aggravating circumstances, specifically finding the killing "especially heinous, atrocious, or cruel." *Id.* at 503. In the absence of any mitigating circumstances, death was presumed the appropriate penalty and the sentence was affirmed. *Id.*

Petitioner argues that *Henry v. Wainwright*, 661 F.2d 56 (5th Cir. 1981), and *Stephens v. Zant*, 631 F.2d 397 (5th Cir. 1980), *reh. denied and modified*, 648 F.2d 446 (5th Cir. 1981), *cert. granted*, — U.S. —, 102 S.Ct. 90, 71 L.Ed.2d 82 (1981), require resentencing under the above circumstances.

In *Stephens* the Georgia Supreme Court had held unconstitutional one of the statutory aggravating circumstances presented to the jury. We held that the death sentence must be set aside because it was impossible to tell from the record the extent to which the Georgia jury had relied on an *unconstitutional* statutory aggravating factor in imposing the death penalty. *Stephens v. Zant*, 631 F.2d at 406. In *Henry*, we held the trial court committed constitutional error in admitting into evidence and permitting the jury to consider evidence of *nonstatutory* aggravating circumstances. *Henry v. Wainwright*, 661 F.2d at 60. These two cases are inapposite to the case at bar.

[5] The instant case involves consideration of neither unconstitutional nor nonstatutory aggravating factors. That evidence was insufficient to support two circumstances and one circumstance was based on the same aspect of the crime as another does not compel the conclusion that the death sentence was unconstitutionally infected by consideration of extraneous evidence. The sentencing jury and judge considered only evidence of factors which could properly be considered by them. Where, as here, there were no statutory mitigating circumstances and the sentencer has considered only constitutional statutory aggravating circumstances, we perceive no reversible error where properly found statutory aggravating circumstances sufficiently support the sentence. The Florida Supreme Court's review has achieved the goals of rationality, consistency and fairness required under *Proffitt v. Florida*, 428 U.S. 242, 258-60, 96 S.Ct. 2960, 2969-70, 49

L.Ed.2d 913 (1976), and *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

[6] Neither did the trial court commit constitutional error in instructing the jury as to all aggravating and mitigating circumstances permitted by the statute. To assure the jury understands the structure of the law as required by *Proffitt*, it seems appropriate that they be charged fully on the Florida statute, provided proper instructions on the burden of proof and the standard of evidence required to prove the factors are given.

III.

Instructions on Mitigating Circumstances

Instructing the jury on aggravating circumstances, the trial judge stated, "you shall consider only the following . . ." and read the statutory language. With regard to mitigating circumstances, he said, "you shall consider the following . . ." again reading the appropriate statutory language. Ford neither objected to the instruction at trial nor raised it on direct appeal.

Relying primarily on *Washington v. Watkins*, 655 F.2d 1346 (5th Cir. 1981), petitioner argues the above instructions improperly limited the jury's consideration to statutory mitigating factors and precluded consideration of nonstatutory mitigating factors contrary to *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). *Lockett* held "the sentencer . . . [must] not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that defendant proffers as a basis for a sentence less than death." 438 U.S. at 604, 98 S.Ct. at 2964.

With reference to aggravating circumstances, the Mississippi trial court in *Washington* instructed the jury to "consider only the following elements . . . ." As to mitigating circumstances, the judge stated, "consider the following elements . . . ." *Washington v. Watkins*, 655 F.2d at 1367. The state court concluded:

> If you unanimously find from the testimony that one or more of the *preceding* elements of mitigation exist[s], then you must consider whether it outweighs the aggravating circumstances you previously found and you must return one of the following verdicts . . .

Id. at 1368 (emphasis added).

Reasoning that in determining whether aggravating outweighed mitigating factors jurors might have believed it was their sworn duty to consider only the two statutory mitigating circumstances enumerated in the charge, the Fifth Circuit reversed Washington's death sentence.

[7, 8] In evaluating the state court's instructions, we must pay careful attention to the words actually spoken to the jury to determine the interpretation a reasonable juror might give the instruction in question. *Sandstrom v. Montana*, 442 U.S. 510, 514, 99 S.Ct. 2450, 2454, 61 L.Ed.2d 39 (1979). The entire charge must be examined as a whole to discern whether the issues and law presented to the jury were adequate. *Davis v. McAllister*, 631 F.2d 1256, 1260 (5th Cir. 1980), *cert. denied*, 452 U.S. 907, 101 S.Ct. 3035, 69 L.Ed.2d 409. Where some deficiency exists in the language of the charge taken as a whole, it must be shown that it so infected the entire trial process that a due process violation occurred. *Cupp v. Naughten*, 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973); *Washington v. Watkins*, 655 F.2d at 1369.

[9] Evaluating the jury charge in this case under the foregoing standard, we reject Ford's contention. While the instructions in *Washington* and the instant case involve similar use of the term "only," there are significant differences. Petitioner's jury was read the entire list of statutory mitigating circumstances and was not confined to two "preceding elements of mitigation," an important factor to the court's decision in *Washington*. 655 F.2d at 1370. More importantly, the sentencing judge's order which stated "[t]here are no mitigating circumstances existing—either statutory or otherwise—which outweigh any aggravating circumstances" reflects his con-

sideration of the nonstatutory mitigating evidence offered by Ford. The Florida statute does not restrict a jury's consideration of mitigating circumstances to those listed in the statute. It is reasonable to conclude the state trial judge's perception that nonstatutory mitigating factors could be considered was conveyed to the advisory jury. The language about which petitioner complains did not so "infect" the entire sentencing process as to present a due process violation.

IV

Standard by Which Aggravating Circumstances Must Outweigh Mitigating Factors

Florida Statute § 921.141(3)(b) requires the sentencing court, in imposing the death penalty, to state in writing its finding "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Petitioner contends that because the statute, case law and jury instructions do not require the state to prove that aggravating factors outweigh mitigating factors "beyond a reasonable doubt," Florida's death penalty statute, on its face and as applied in this case, denies convicted capital defendants due process. Ford argues that the crime of capital murder in Florida includes the element of mitigating circumstances not outweighing aggravating circumstances, and that the capital sentencing proceeding in Florida involves new findings of fact significantly affecting punishment. Since the element is part of the crime, he asserts that the beyond a reasonable doubt standard is required by *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), and its progeny. We reject this argument for several reasons.

[10] First, that the aggravating must outweigh mitigating factors for imposition of the death penalty under the Florida statute is not an element of the crime of capital murder in Florida. Under the Florida bifurcated death penalty statute, the sentencing proceeding is entirely separate from trial on the capital offense. Indeed, in certain circumstances the state judge can summon different jurors for the latter phase. Fla.Stat. § 921.141(1). Guilt of the capital offense having already been decided, the sentencing jury's sole function is to render an advisory sentence aiding the state judge in determining whether the defendant should be sentenced to death or life imprisonment. *Id.* Thus, that the Due Process Clause "protects the accused against *conviction* except upon proof beyond a reasonable doubt of every *fact necessary to constitute the crime* with which he is *charged*," *In re Winship*, 397 U.S. at 364, 90 S.Ct. at 1072 (emphasis added), is irrelevant to deciding under the Florida statute whether there are insufficient mitigating circumstances to outweigh aggravating circumstances. The aggravating and mitigating circumstances are not facts or elements of the crime. Rather, they channel and restrict the sentencer's discretion in a structured way after guilt has been fixed. As the Supreme Court explained:

> While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of *Furman* are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.

Proffitt v. Florida, 428 U.S. 242, 258, 96 S.Ct. 2960, 2969, 49 L.Ed.2d 913 (1976).

Second, the United States Supreme Court has declared constitutional on its face Florida's capital sentencing procedure, including its weighing of aggravating and mitigating circumstances. The Supreme Court stated:

> The directions given to judge and jury by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones. As a result, the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed.

Proffitt v. Florida, 428 U.S. at 258, 96 S.Ct. at 2969. The statute, facially constitutional, was strictly applied according to its terms.

[11] Third, Ford's argument under *In re Winship* seriously confuses proof of facts and the weighing of facts in sentencing. While the existence of an aggravating or mitigating circumstance is a fact susceptible to proof under a reasonable doubt or preponderance standard, see *State v. Dixon*, 283 So.2d 1, 9 (Fla.1973), and *State v. Johnson*, 298 N.C. 47, 257 S.E.2d 597, 617-18 (1979), the relative *weight* is not. The process of weighing circumstances is a matter for judge and jury, and, unlike facts, is not susceptible to proof by either party. Petitioner's contrary suggestion is based on a misunderstanding of the weighing process, the statute and the guiding and channeling function identified in *Proffitt v. Florida*, 428 U.S. at 258, 96 S.Ct. at 2969. Indeed, it appears no case has applied *In re Winship* in the manner Ford urges. The North Carolina and Utah cases cited by him which imposed a reasonable doubt standard in this situation turned on construction of state statutes rather than the due process rationale of *In re Winship*. *See State v. Johnson*, 257 S.E.2d at 617, and *State v. Woods*, 648 P.2d 71 (1981) [Utah 1981].

Ford's alternate argument, raised for the first time in his reply brief, is that the Florida capital sentencing proceeding involves new findings of fact significantly affecting punishment to which the full panoply of due process rights should be extended, including the requirement that the state prove beyond a reasonable doubt that mitigating factors outweigh aggravating factors. Again, petitioner confuses proof of *facts* with the weighing process undertaken by the sentencing jury and judge. Because the latter process is not a fact susceptible of proof under any standard, we reject this contention.

V.

Florida Supreme Court's Standard of Review

Ford claims the Florida Supreme Court, in reviewing the evidence of aggravating and mitigating circumstances, violated the Eighth Amendment by failing to apply in his case the same standard of review applied in other capital cases. Specifically, he contends that under Florida case law, the court should have set aside two aggravating circumstances, collapsed two aggravating circumstances into one, and found the existence of one statutory mitigating circumstance and nonstatutory mitigating circumstances.

[12] While petitioner characterizes this contention as the Florida Supreme Court's failure to apply a consistent standard of review, the district court correctly discerned that he is simply "quarreling" with the state court. Where in a capital punishment case the state courts have acted through a properly drawn statute with appropriate standards to guide discretion, *Proffitt v. Florida*, 428 U.S. at 258-59, 96 S.Ct. at 2969, federal courts will not undertake a case-by-case comparison of the facts in a given case with the decisions of the state supreme court. *Spinkellink v. Wainwright*, 578 F.2d 582, 604-05 (5th Cir. 1978). This rule stands even though were we to retry the aggravating and mitigating circumstances in these cases, "we may at times reach results different from those reached in the Florida state courts." *Id.* at 605.

[13] The Supreme Court of Florida is the ultimate authority on Florida law and we do not sit to question its interpretation of that State's statutes. *See Stephens v. Zant*, 631 F.2d at 405-06. Ford has not cited and we have not found any habeas corpus decision in which this Court has reversed a death sentence due to the state court's incorrect decision as to the existence or absence of aggravating and mitigating circumstances.

Moreover, examination of the relevant Florida Supreme Court decisions reveals that its review of petitioner's death sentence was not arbitrary, capricious or in disaccord with the constitutional principles relating to sentencing in capital cases. Under 28 U.S.C.A. § 2254(d), we presume cor-

rect facts properly found by the state courts. *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981), *after remand*, — U.S. ——, 102 S.Ct. 1303, 71 L.Ed.2d 480 (1982). There is nothing in this record to show the Florida Supreme Court failed to apply the standard of review mandated by *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), and its progeny.

VI.

Assistance of Counsel at Sentencing

Petitioner contends he received ineffective assistance of counsel at sentencing. Specifically he claims that although counsel called character witnesses and a psychiatrist to testify in mitigation, he "failed to focus the trial judge's and jury's attention on the critical factors relevant to the sentence determination." Careful review of the record and Ford's specific arguments reveals this contention is nothing more than an attack on the reasoned tactics and strategy of experienced trial counsel.

[14, 15] On reviewing ineffective assistance of counsel claims, we do not sit to second guess considered professional judgments with the benefit of 20/20 hindsight. *Washington v. Watkins*, 655 F.2d at 1355; *Easter v. Estelle*, 609 F.2d 756 (5th Cir. 1980). We have consistently held that counsel will not be regarded constitutionally deficient merely because of tactical decisions. *See United States v. Guerra*, 628 F.2d 410 (5th Cir. 1980), *cert. denied*, 450 U.S. 934, 101 S.Ct. 1398, 67 L.Ed.2d 369 (1981); *Buckelew v. United States*, 575 F.2d 515 (5th Cir. 1978); *United States v. Beasley*, 479 F.2d 1124, 1129 (5th Cir.), *cert. denied*, 414 U.S. 924, 94 S.Ct. 252, 38 L.Ed.2d 158 (1973); *Williams v. Beto*, 354 F.2d 698 (5th Cir. 1965). That an attorney's strategy may appear wrong in retrospect does not automatically mandate constitutionally ineffective representation. *Baty v. Balkcom*, 661 F.2d 391, 395 n.8 (5th Cir. 1981); *Baldwin v. Blackburn*, 653 F.2d 942, 946 (5th Cir. 1981).

[16] That counsel for a criminal defendant has not pursued every conceivable line of inquiry in a case does not constitute ineffective assistance of counsel. *Lovett v. Florida*, 627 F.2d 706, 708 (5th Cir. 1980). This is not a case in which counsel allegedly failed to adequately prepare and investigate. *See Washington v. Strickland*, 673 F.2d 879 (5th Cir. 1982). Ford's counsel was reasonably likely to render and did render reasonably effective assistance. *Herring v. Estelle*, 491 F.2d 125, 127 (5th Cir. 1974). Because the record reveals counsel's representation was constitutionally adequate and there resulted no prejudice to petitioner by any action or inaction of counsel, see *Washington v. Watkins*, 655 F.2d at 1362, Ford has not carried his burden of proving ineffective assistance of counsel. *United States v. Killian*, 639 F.2d 206, 210 (5th Cir. 1981).

VII.

The Brown Issue: Nonrecord Material Before the Florida Supreme Court

Petitioner alleges the Florida Supreme Court had a practice of receiving nonrecord materials concerning death row inmates during the pendency of the appeal of his death sentence. Ford specifically claims that in his case the Florida Supreme Court reviewed *ex parte* psychiatric evaluations or contact notes, psychological screening reports, post-sentence investigation reports and state prison classification and admission summaries. This practice, he contends, precluded adversarial testing of the information in violation of his rights to due process of law, effective assistance of counsel, confrontation and reliability and proportionality of capital sentencing. Additionally, he argues the court's receipt of results of psychiatric examinations which were conducted without first informing him of his Fifth Amendment rights violated his privilege against self-incrimination and his right to confer with his attorney before determining whether to submit to them.

This issue first surfaced in a petition for writ of habeas corpus directed to the Florida Supreme Court brought on behalf of 122

Florida death row inmates, of which Ford was one. The Court denied the petition with a full opinion. *Brown v. Wainwright*, 392 So.2d 1327 (Fla.), *cert. denied*, — U.S. —, 102 S.Ct. 542, 71 L.Ed.2d 407 (1981).

We reject the contention both generally and specifically as made for Ford. The function of the Supreme Court of Florida in these cases is to review sentences for procedural regularity and proportionality. The court does not "impose" sentence, and for that reason there cannot exist a due process violation under *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1980). As the Florida Supreme Court aptly stated:

> The record of each proceeding, and precedent, necessarily frame our determinations in sentence review. Our opinions, of course, then expound our analysis. Factors or information outside the record play no part in our sentence review role. Indeed, our role is neither more nor less, but precisely the same as that employed by the United States Supreme Court in its review of capital punishment cases. Illustrative of the Court's exercise of the review function is *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).
>
> . . . . . .
>
> It is evident, once our dual roles in the capital punishment scheme are fully appreciated, that non-record information we may have seen, even though never presented to or considered by the judge, the jury, or counsel, plays no role in capital sentence "review." That fact is obviously appreciated by the United States Supreme Court, for it very carefully differentiated the sentence "review" process of appellate courts from the sentence "imposition" function of trial judges in *Proffitt* and *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

Brown v. Wainwright, 392 So.2d at 1332–33. We view the court's statement in *Brown* that such material would be irrelevant to its ultimate decision in these cases correct as a description of its function and as a statement of law. Of course, review of the records in other cases is necessarily involved in achieving the United States Supreme Court's requirement of consistency and proportionality.

[17] Specifically we reject the claim for three reasons. First, there is not an iota of evidence in this record to indicate the Florida Supreme Court viewed *any* extra-record materials in affirming petitioner's conviction and sentence. The court's reviewing such information in connection with death row inmates other than Ford would not render his death sentence unconstitutional. Thus, discovery on this issue, based solely on Ford's bare, unsupported allegations, would be nothing more than a fishing expedition in which it would be necessary for him to show that in his case the court received, viewed and relied on the information. Since the latter could not be shown in the face of *Brown v. Wainwright*, we affirm the district court's refusal to permit Ford to launch such a discovery expedition.

Second, there is absolutely no indication what material could have been received by the court which was prejudicial. By the specific description of the information set forth in his habeas corpus petition, Ford presumably knows something of the nature of the materials allegedly viewed. He made no effort whatsoever to demonstrate those materials were harmful to his case.

[18, 19] Third, in the face of petitioner's unsupported allegations to the contrary, we accord a presumption of correctness to the Florida Supreme Court's statement that its members properly perform their procedural appellate function in reviewing death sentences. *See* 28 U.S.C.A. § 2254(d); *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981), *after remand*, — U.S. —, 102 S.Ct. 1303, 71 L.Ed.2d 480 (1982). In the context of a federal collateral attack on a state criminal conviction, comity and federalism demand no less. As the highest court in the state, the Florida Supreme Court's interpretation of its procedural role is the law of the state and we do not question it. *See Stephens v. Zant*, 631 F.2d at 405–06.

These conclusions do not reflect the view that any court, including an appellate court, should review material extraneous to the record. We do not condone such a practice.

Conclusion

The Court has discussed above the seven issues as framed by petitioner in his brief. Although not required to do so, because of the now usual practice of challenging counsel's effectiveness in later proceedings, we have examined every issue asserted in the petition for writ of habeas corpus. These issues were set forth by headings in the pleadings as follows:

Grounds for Habeas Corpus Relief

A. Denial of Right to Confront Witnesses
B. Non-disclosure of Exculpatory Evidence
C. Denial of Right to Assistance of Counsel
D. Witherspoon Violation of Petitioner's Right to Trial by Fair and Impartial Jury
E. Sentencing Phase Instructions to the Jury: Permitting the Arbitrary, Unguided Imposition of the Death Penalty
F. Unconstitutional Shifting of the Burden of Proof at the Penalty Phase
G. Review by the Florida Supreme Court: Failure to Set Aside Death Sentence Despite the Substantial Erosion of the Basis for the Death Sentence
H. Review by the Florida Supreme Court: Failure to Assure the Imposition of the Death Penalty Fairly and Consistently
I. The Violation of Mr. Ford's Constitutional Rights by the Practice of the Supreme Court of Florida Reviewing, in Connection with Appeal, Unknown to Mr. Ford or His Counsel, Certain Documents Pertaining to Mr. Ford
J. Ineffective Assistance of Counsel: Guilt Phase
K. Ineffective Assistance of Counsel: Penalty Phase
L. Ineffective Assistance of Counsel: Appeal

Many of these grounds were asserted under different nomenclature on this appeal. The ones not raised for review by this Court were wisely abandoned. A review of the entire petition and the district court's decision reveals *no* grounds upon which relief should be granted in this case. The district court's decision is affirmed on every point considered by it.

AFFIRMED.

KRAVITCH, Circuit Judge, concurring in part and dissenting in part:

Although I concur in Parts I, IV, V, and VI of the majority's opinion, I write separately because I disagree with the majority's resolution of the sentencing issues in Parts II, III, and VII. In my view, Supreme Court and former Fifth Circuit precedent compels a reversal on both the aggravating and mitigating circumstances claims and on the claim that the state court considered extra-record information in reviewing the sentence. Hence I would remand to the Florida courts for resentencing.

Effect of Florida Supreme Court's Overruling of Aggravating Circumstances Found by Trial Court

Petitioner argues that the appellate court erred in affirming his sentence despite its holding invalid three of the aggravating circumstances on which the trial judge had relied in imposing the sentence. As the majority has noted, petitioner relies on *Stephens v. Zant*, 631 F.2d 397 (5th Cir. 1980), *reh. denied and modified*, 648 F.2d 446 (5th Cir. 1981), *cert. granted*, — U.S. —, —, 102 S.Ct. 90, 70 L.Ed.2d 82 (1981),[1] and *Henry v.*

1. *Stephens* was orally argued before the Supreme Court on February 24, 1982, 50 U.S.L.W. 3694, and the Court's decision is still pending. Since in my opinion this case cannot adequately be distinguished from *Stephens*, the Supreme Court's decision in *Stephens* could affect the

Wainwright, 661 F.2d 397 (5th Cir. 1981). In rejecting petitioner's argument, the majority attempts to distinguish this case from *Stephens* and *Henry* on the ground that those cases involved jury consideration of unconstitutional factors while here the initial sentencing error was not of constitutional dimension. Majority Opinion, *supra*, at 439. The reasoning of those cases does not support this distinction, however.

As the majority points out, the trial courts' errors with respect to aggravating factors in *Henry* and *Stephens* were constitutional ones.[2] The Fifth Circuit's decision in those cases to remand for resentencing was not predicated on the nature of the trial courts' errors, however. Rather, the court in *Stephens* and *Henry* was concerned with the procedural regularity in capital sentencing that *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) held is mandated by the eighth amendment. *Furman* required that juries' discretion in capital sentencing be guided by objective and *rationally reviewable* standards. The Fifth Circuit's resolution of the *Henry* and *Stephens* cases was based directly on *Furman*. In addition to the unconstitutional factors considered by the sentencers in those cases, several valid aggravating circumstances had been found. In both cases, the state supreme courts had affirmed the defendants' sentences on the basis of the valid factor alone. *See Henry v. Wainwright*, 661 F.2d at 57 n.2, 58-59; *Stephens v. Zant*, 631 F.2d 405. The Fifth Circuit disagreed and held that the defendants were entitled to new sentencing proceedings for two reasons. First, by allowing the jury to consider constitutionally invalid factors, the trial judges had failed to channel the juries' discretion to ensure nonarbitrary sentencing.[3] Second, even though the juries could rationally have recommended the death sentence on the basis of the permissible factors they had considered, there was no way for the court retrospectively to determine whether they would in fact have done so had they been properly instructed. An attempt to second-guess the jury, in the court's view, was not the proper role of the reviewing court but was "the antithesis of the rational review of the jury's application of clear and objective standards contemplated by *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) and its progeny."[4]

outcome of this case. For this reason, I would defer decision of the *Stephens* issue until the Supreme Court has decided it.

2. In *Stephens*, the judge had permitted the jury to consider four of the statutory aggravating circumstances. The jury found that three of the four were present and recommended death. On review, the Georgia Supreme Court noted that one of the circumstances relied on by the jury had subsequently been held unconstitutionally vague; it nonetheless affirmed Stephens' sentence because it found the evidence supported the other three aggravating factors found by the jury. *See Stephens v. Zant*, 631 F.2d at 405-06.

   In *Henry*, the court faced a similar situation. At the defendant's sentencing hearing the prosecutor had presented evidence of an aggravating factor not within those listed in the sentencing statute, and the judge instructed the jury that they were not limited to consideration of the statutory aggravating factors. The jury recommended the death penalty, which the judge then imposed. The Florida Supreme Court upheld the sentence even though it recognized that the judge had erred in allowing the jury to consider the nonstatutory factor, concluding that "death sentences *partially* predicated on nonstatutory aggravating factors do *not* violate constitutional prohibitions." *Henry v. Wainwright*, 661 F.2d at 59 (citing *Elledge v. State*, 346 So.2d 998, 1002-02 (Fla. 1977)).

3. *Stephens v. Zant*, 631 F.2d at 406 (as modified by 648 F.2d 446); *Henry v. Wainwright*, 661 F.2d at 60.

4. *Henry v. Wainwright*, 661 F.2d at 60 n.8 (citing *Woodson v. North Carolina*, 428 U.S. 280, 303, 96 S.Ct. 2978, 2990, 49 L.Ed.2d 944 (1976)). The *Henry* panel rejected the reasoning of the Florida court that the sentence would be affirmed as long as no mitigating circumstances were found because "there is no danger that the unauthorized [aggravating] factor tipped the scale in favor of death." *Henry v. Wainwright*, 661 F.2d at 59. *Henry* held that the reviewing court's role in capital sentencing was not to second-guess the motives of the jury in recommending the death penalty:

   > Guarding against the arbitrary and discriminatory imposition of the death penalty must not become simply a guessing game played by a reviewing court in which it tries to

The Fifth Circuit's decision to remand for resentencing in *Henry* and *Stephens* does not depend on the status of the *sentencer's* error as constitutional or statutory but rather concerns the procedure for rectifying that error. The capital sentencing statutes under consideration in those cases had been designed by the state legislatures to meet *Furman*. As those cases recognized, where a judge or jury disregards or misinterprets the procedures or criteria established by the state's sentencing scheme, the regularity and objectivity in sentencing that the statute is designed to accomplish is defeated. Once such an error has been made, however, there are different possible approaches to correcting it. *Henry* and *Stephens* recognized that not all such approaches satisfy *Furman*'s rational appellate review requirement. They thus rejected the state courts' method. Superimposing on defective sentencing a review procedure under which the appellate court, having identified the sentencer's error, then speculates as to what the sentencer would have done had the error not been made compounds rather than resolves the problem and is clearly inconsistent with *Furman*. The Supreme Court has also recognized the infirmity of such a review process. *Presnell v. Georgia*, 439 U.S. 14, 99 S.Ct. 235, 58 L.Ed.2d 207 (1978) (per curiam) (imposition of death sentence violated due process where state supreme court rejected jury's grounds for sentence but affirmed sentence on ground that evidence supported theory not relied on by jury). *Cf. Eddings v. Oklahoma*, — U.S. —, —, 102 S.Ct. 869, 877, 71 L.Ed.2d 1 (O'Connor, J., concurring) (where it appears trial judge believed he could not consider mitigating evidence, Court will not speculate as to whether he did consider it but found it insufficient; "*Woodson* [*v. North Carolina*, 428 U.S. 280 (96 S.Ct. 2978, 49 L.Ed.2d 944) (1976)] and *Lockett* [*v. Ohio*, 438 U.S. 586 (98 S.Ct. 2954, 57 L.Ed.2d 973) (1978)] require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the court").

The posture of this case is identical to, and therefore poses the same problem raised by, *Henry* and *Stephens*. The trial judge found that eight statutory aggravating factors and no mitigating factors existed and therefore sentenced petitioner to death.[5] On appeal, the Florida Supreme Court held that the trial judge had erred with respect to several of the aggravating circumstances[6] but upheld petitioner's sentence because "even though there was some error in assessment of some of the statutory

> discern whether the nonstatutory aggravating factors exerted a decisive influence on the sentence determination. The guarantee against cruel and unusual punishment demands more.
>
> *Id.* at 60.
>
> Similarly, in *Stephens* the court held the sentence unconstitutional because it was "impossible for a reviewing court to determine satisfactorily that the verdict in this case was not decisively affected by an unconstitutional statutory aggravating circumstance." *Stephens v. Zant*, 631 F.2d at 406. The constitutional deficiency in the sentence was not only that "the jury's discretion here was not sufficiently channelled," but also "that the process in which the death penalty was imposed in this case was not 'rationally reviewable.'" *Id.* at 406. *See also id.* (as modified by 648 F.2d 446).

5. *See* Trial Court Findings on Sentencing, *reprinted in Ford v. State*, 374 So.2d 496, 500-02 n.1 (Fla.1979). Under Florida's capital sentencing statute, Fla.Stat. § 921.141, a defendant convicted of a crime punishable by death receives a separate sentencing hearing before the judge and jury that convicted him. At that proceeding, the parties may present evidence of aggravating and mitigating circumstances, and the jury is instructed to weigh those factors and render an advisory sentence. If it concludes that the aggravating factors outweigh the mitigating ones it must recommend the death penalty; otherwise it is required to recommend life imprisonment. *Id.* § 921.141(2). The judge, with the jury's recommendation in mind, then makes the same determination and decides which sentence to impose. *Id.* § 921.141(3). If the judge imposes a sentence of death, he is required to set forth findings of fact with respect to aggravating and mitigating circumstances. *Id.*

6. Specifically, it held that the evidence did not support the trial court's findings of two of the factors and that the evidence used by the judge to support two other factors should have been viewed as establishing only one aggravating circumstance. *Ford v. State*, 374 So.2d at 501-03.

aggravating factors, there being no mitigating factors present death is presumed to be the appropriate penalty." *Ford v. State*, 374 So.2d at 503. By attempting to distinguish this case from *Henry* and *Stephens* the majority confuses the requirement of *Furman* that capital sentencing be structured by procedures and criteria that are rationally reviewable with the requirements of other cases imposing substantive constitutional limitations on such criteria.[7] I do not suggest that every question of statutory interpretation involving capital sentencing criteria necessarily implicates the Federal Constitution. On the contrary, it is the procedure here employed by the state court, and not its substantive decision, that in my view raises a constitutional issue. I would hold only that the rational review requirement of *Furman* compels resentencing in instances, such as this one, in which the sentencer has misapplied the state's capital sentencing criteria.

Instructions on Mitigating Circumstances

The instructions given to the jury in this case were identical in most critical respects to those held invalid in *Washington v. Watkins*, 655 F.2d 1346 (5th Cir. 1981).[8] The

7. *E.g., Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (aggravating criterion that offense was "outrageously or wantonly vile, horrible, or inhuman" unconstitutional as applied to crime reflecting no more "depravity" of mind than that of anyone guilty of murder); *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (mitigating criteria to be considered in capital sentencing must include evidence proffered by defendant concerning his character, record, and offense). *See also Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (aggravating circumstances will not justify death sentence where such penalty is disproportionate to offense); *Gregg v. Georgia*, 428 U.S. 153, 173, 96 S.Ct. 2909, 2925, 49 L.Ed.2d 859 (1976) (death sentence must accord with "evolving standards of decency" as reflected in "contemporary values" and with fundamental "dignity of man").

8. The instructions invalidated in *Washington* were as follows:

> Members of the jury, as the court explained to you in the beginning of the trial, you have heard some evidence in aggravation put on by the State and you have heard evidence in mitigation put on by the defendant. You must in your sentencing find at least one item present of aggravation before you could impose the death penalty. If you find an item in aggravation present beyond a reasonable doubt, then you must consider any evidence in mitigation. And unless the evidence in mitigation could overcome the aggravation, of course, then you could return the death penalty.
>
> You have found the defendant guilty of the crime of capital murder. You must now decide whether the defendant will be sentenced to death or to life imprisonment. In reaching your decision you must obviously consider the detailed circumstances of the offense for which the defendant was convicted and the defendant himself. To return the death penalty you must find that the aggravating circumstances, those which tend to warrant the death penalty, outweigh the mitigating circumstances, which are those which tend to warrant the lesser [sic] severe penalty. *Now consider only the following elements of aggravation in determining whether the death penalty should be imposed.* One, the capital murder was committed while the defendant Johnny Lewis Washington was engaged in the commission of the crime of robbery. Two, the defendant Johnny Lewis Washington committed this capital murder in an especially heinous, atrocious, or cruel manner. Those are your elements of aggravation.
>
> You must unanimously find beyond a reasonable doubt that one or more of these existed in order to return the death penalty. Now if one or more of those elements of aggravation is found to exist, then you must consider whether there are mitigating circumstances which outweigh the aggravating circumstances. *Now consider the following elements of mitigation in determining whether the death penalty should not be imposed:* One, that the defendant has no significant history of prior criminal activity and two, the defendant's age at the time of the capital murder.
>
> If you unanimously find from the testimony that *one or more of the preceding elements of mitigation exist[s]*, then you must consider whether it outweighs the aggravating circumstances you previously found and you must return one of the following verdicts.

Washington v. Watkins, 655 F.2d at 1367-68.

The jury instructions given by the trial judge at petitioner's trial provided:

> Ladies and gentlemen, you have heard the evidence and argument of counsel necessary to enable you to render an advisory sentence to the Court as to whether the defendant should be sentenced to death or to life imprisonment.
>
> * * * * * *
>
> Your advisory sentence will have three parts. First: Whether sufficient aggravating circumstances exist to justify a sentence of death.

majority attempts to distinguish *Washington* on the basis of (1) the concluding reference by the trial judge in *Washington* to "the preceding elements of mitigation" and (2) the fact that the charge here listed all the statutory elements of mitigation whereas in *Washington* the judge listed only two of the statutory factors. The majority's reliance on the "preceding elements" language is misplaced. While it is true that the *Washington* court found that language "*further supported*" the inference that the enumerated factors were the sole factors to be considered by the jury, *id.* at 1370, the court concluded that "a reasonable juror might well infer" the listed factors were exclusive from the judge's use of the term "only" with respect to aggravating factors and from the immediately following "almost exactly parallel[ ]" language pertaining to mitigating circumstances. These two features of the judge's instruction alone would have supported such inference. *See id.* The "preceding elements" language present in *Washington* was supportive, but clearly not the decisive factor in the court's decision. *Id.* The majority's second purported distinction—the enumeration of all the statutory mitigating factors here in comparison with two listed in *Washington*—is a distinction without a difference. The issue we are here concerned with is whether the jury reasonably may have believed it was limited to considering mitigating evidence that fit within the statutorily enumerated factors. Whether the instructions set forth two, five, or a dozen statutory factors has no bearing on the jury's understanding of the defendant's right under *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) to have it consider *nonstatutory* factors as well. At petition-

Second: Whether sufficient mitigating circumstances exist which outweigh any aggravating circumstances to justify a sentence of life imprisonment rather than a sentence of death.

Third: Based on those considerations whether the defendant should be sentenced to life imprisonment or to death.

* * * * * *

As to aggravating circumstances, in considering whether sufficient aggravating circumstances exist to justify a sentence of death, you shall consider only the following:

A. whether the defendant was under sentence of imprisonment when the defendant committed the murder of which he has just been convicted by you;

B. whether the defendant has previously been convicted of another capital felony or of a felony involving the use of or threat of violence to the person;

C. whether in committing the murder of which the defendant has just been convicted by you, the defendant knowingly created a great risk of death to many persons;

D. whether the murder of which you have convicted the defendant was committed while the defendant was engaged in the commission of or attempt to commit, or flight after committing, or attempting to commit any robbery, rape, arson, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb;

E. whether the murder of which the defendant has just been convicted by you was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

F. whether the murder of which the defendant has just been convicted by you was committed for pecuniary gain;

G. whether the murder of which the defendant has just been convicted by you was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws;

H. whether the murder of which the defendant has just been convicted by you was especially heinous, atrocious, or cruel.

As to mitigating circumstances, in considering whether sufficient mitigating circumstances exist which outweigh any aggravating circumstances to justify a sentence of life imprisonment rather than a sentence of death, you shall consider the following:

A. whether the defendant has no significant history of prior criminal activity;

B. whether the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;

C. whether the victim was a participant in the defendant's conduct or consented to the act;

D. whether the defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor;

E. whether the defendant acted under extreme duress or under the substantial domination of another person;

F. whether the capacity of the defendant to appreciate the criminality of his conduct or to conform the defendant's conduct to the requirements of the law was substantially impaired;

G. the age of the defendant at the time of the crime.

er's sentencing hearing, as in Washington's and Lockett's, his attorney presented evidence concerning his character and background. "*[N]owhere* in the trial court's charge to the jury in the sentencing phase of [petitioner's] trial is there any explicit instruction that the jury was free to consider mitigating factors other than [those enumerated in the statute]," however. *Id.* at 1365. In *Washington*, the court found that no language in the charge rectified the absence of such an instruction by indicating to a reasonable jury that it was not limited to the statutory factors. The court reached this conclusion despite the trial judge's prefatory instruction that in reaching its decision the jury "must obviously consider the detailed circumstances of the offense for which the defendant was convicted and the defendant himself." *Id.* at 1369-70. Here there was lacking even the vague reference to the defendant's character and circumstances that was present in the *Washington* case. See note 8 *supra*. Thus, the instructions given in petitioner's sentencing hearing were even *less* likely to effectuate petitioner's right to have the jury consider evidence of his character and background than the instructions invalidated in *Washington*.[9]

Finally, the majority ascribes great significance to the sentencing judge's finding that "[t]here are no mitigating circumstances existing—either statutory or otherwise—which outweighs [sic] any aggravating circumstances." Majority Opinion, *supra* at 440. *See* Trial Court Findings on Sentencing, *reprinted in Ford v. State*, 374 So.2d 496, 500-02 n.1 (Fla.1979). From this four-word phrase buried in the middle of the trial judge's detailed findings concerning the *statutory* mitigating and aggravating factors, the majority discerns not only an understanding on the part of the judge that nonstatutory mitigating evidence was relevant, the majority additionally "conclud[es]" from these words that the "judge's perception that nonstatutory factors could be considered was *conveyed* to the advisory jury." Majority Opinion, *supra* at 441 (emphasis added). With all due respect, I am unable to follow the majority's reasoning. It has always been my understanding that jury instructions, not trial court findings, serve the function of informing the jury of the law. For the reasons stated above, I do not believe the instructions in this case adequately informed the jury of its duty to consider nonstatutory mitigating evidence.

Florida Supreme Court's Consideration of Extra-Record Materials

As the majority notes, petitioner claims the Florida Supreme Court reviewed vari-

9. *Washington* compels us to remand for resentencing if the trial court's instructions, taken in their entirety, could have led a reasonable juror to believe he could consider only the statutory mitigating circumstances. Our inquiry is thus an objective one that focuses on the judge's instructions, and petitioner is not required to prove actual subjective misunderstanding of the law by the jurors. Although petitioner need not establish the actual state of mind of the jurors, evidence of their subjective understanding if available may support a conclusion that the instructions could reasonably have engendered their misunderstanding of the law. In this case, there is evidence in addition to the judge's instructions suggesting that the jurors actually considered themselves limited to the statutory mitigating circumstances. At the sentencing hearing, the judge read to the jury the charge concerning aggravating and mitigating circumstances. See note 8 *supra*. He did not give the jury a copy of that portion of the charge, however, because petitioner's attorney requested that he not do so. Shortly after the jury began its sentencing deliberations, the foreman submitted a request to the judge, which stated: "Judge Lee, we would like the list of charges regarding the definitions of aggravating circumstances and mitigating circumstances. Signed L. Pati, foreman." The defense attorney objected to the judge's reinstructing the jury on this point, but stated that if the court was to do so he would prefer the instruction be given orally rather than in writing. The judge informed the foreman that he would not provide them with a written charge but would again read it to them if they wished. The foreman then said to the other jurors: "You want to hear them again, what they consider the aggravating circumstances, what *they consider the mitigating circumstances*. They can't give us the things to take in. He will read them again for us; okay?" The judge then repeated the instruction previously given concerning aggravating and mitigating factors. See note 9 *supra*. The foreman's request for reinstruction concerning "what [the court] consider[s] the mitigating circumstances" indicates that he understood the circumstances enumerated by the court to be exclusive.

mis reports, evaluations, and other materials relevant to his character that he was unaware were being used and was afforded neither access to nor an opportunity to rebut.[10] Petitioner, with 122 other capital defendants in Florida, raised this claim initially in a habeas action in the Florida Supreme Court. *Brown v. Wainwright*, 392 So.2d 1327 (Fla.1981), *cert. denied*, — U.S. —, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981). In deciding that claim,[11] the Florida court accepted, arguendo, the "petitioners' most serious charges," *id.* at 1331, and held that as a matter of law petitioners were not entitled to relief. *Id.* at 1331-33. The court thus received no evidence nor made any factual findings in reaching its decision. The reasoning given by the Florida court for its resolution of this issue was twofold. First, it declared that extra-record materials are "irrelevant" to, and "play no part in," its review of capital sentences. *Id.* at 1331, 1332. Second, it held that the rule in *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), on which petitioners relied was inapplicable to situations where extra-record information was considered only at the review stage and not during the initial sentencing proceeding. *Id.* at 1331-33.

The majority adopts wholesale the reasoning of the Florida court, holding that the appellate review function is distinguishable from sentence "imposition" and that the former is not subject to any of the procedural safeguards that govern the latter. Majority Opinion, *supra* at 443-444. The majority accepts the state court's description of its function and its assertion that it "properly perform[s]" that function as factual findings that must be presumed correct. Majority Opinion, *supra* at 444 (citing *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981)). As an additional basis for denying petitioner's claim, the majority states that petitioner has presented no evidence that the practice he complains of was utilized in his own case or that any extra-record material that possibly was reviewed was prejudicial. I am unpersuaded by the majority's discussion and find disturbing its treatment of this important issue.

The sentencing stage of a criminal trial can be as critical, with respect to its impact on the accused, as the determination of guilt. The significance of the sentencing process and its effect on the defendant are greatest in cases involving the death penalty, which "differs from all other forms of criminal punishment, not in degree but in kind." *Furman v. Georgia*, 408 U.S. 238, 306, 92 S.Ct. 2726, 2760, 33 L.Ed.2d 346 (1972) (Stewart, J., concurring).[12] *See also Witherspoon v. Illinois*, 391 U.S. 510, 522

10. Petitioner claims that at the time of his appeal to the Florida Supreme Court that court was engaged in the regular practice of soliciting, receiving, and reviewing extra-record materials of this type—without notifying the parties involved—in connection with its review of sentencing in capital cases. Petitioner further alleges that much of this material, along with the court's letters requesting it in particular cases, was purged from the court's files rendering verification that the practice was engaged in in particular cases very difficult.

11. While refusing to allow joinder of the 123 petitions because "the facts relevant to each vary significantly," the court adjudicated Brown's petition, which adjudication in its view "effectively dispose[d] of all claims for relief of those petitioners who have joined with Brown." *Id.* at 1330. Although the court claimed to be adjudicating Brown's petition only, its opinion repeatedly refers to "petitioners'" claims and contentions. *Id.* at 1330, 1331, 1332 & 1333, and concludes by denying "[t]he petitions of Brown *and the others* for writs of habeas corpus and for other extraordinary relief." *Id.* at 1333 (emphasis added).

12. Five members of the Supreme Court have "expressly recognized that death is a different kind of punishment from any other which may be imposed in this country." *Gardner v. Florida*, 430 U.S. 349, 357, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977) (citing various concurring and dissenting opinions in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) and *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)).

Lockett followed a group of cases, decided in 1976, in which the Supreme Court addressed the constitutionality of states' post *Furman* death penalty statutes. *See Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); *Woodson v. North Carolina*, 428

n.20, 88 S.Ct. 1770, 1776 n.20, 20 L.Ed.2d 776 (1968). Hence *Furman* held that imposition of the death penalty violates the eighth amendment where the process by which it is imposed is standardless and arbitrary. Subsequent cases reaffirmed this principle holding that individualized sentencing, guided by standards and procedures that constrain the sentencer's discretion, is constitutionally mandated in capital cases. *Lockett v. Ohio*, 438 U.S. 586, 600-01, 605, 98 S.Ct. 2954, 2962-2963, 2965, 57 L.Ed.2d 973 (1978).[13]

In *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), the Supreme Court specifically addressed whether a death sentence imposed on the basis of material not disclosed to the defendant violated the Constitution.[14] The Court held that procedure unconstitutional under the eighth amendment and the due process clause.[15] The plurality first noted two constitutional developments requiring close scrutiny of capital sentencing procedures: (1) the Court's recognition of the "qualita-

U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976). The plurality opinions in those cases emphasized that capital sentencing procedures should not create "a substantial risk that the death penalty [will] be inflicted in an arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. at 188, 96 S.Ct. at 2932; *Jurek v. Texas*, 428 U.S. at 274, 276, 96 S.Ct. at 2957, 2958; *Proffitt v. Florida*, 428 U.S. at 252, 53, 258, 96 S.Ct. at 2966, 2967, 2969, and required that sentencer discretion in capital cases be "directed and limited" to provide consistent and rational imposition of the death penalty. *Gregg v. Georgia*, 428 U.S. at 189, 96 S.Ct. at 2932; *Proffitt v. Florida*, 428 U.S. at 255, 58, 96 S.Ct. at 2968, 2969; *Jurek v. Texas*, 428 U.S. at 270-74, 276, 96 S.Ct. at 2955, 2957, 2958, and ensure "reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. at 305, 96 S.Ct. at 2991.

13. *Lockett* held unconstitutional a capital sentencing statute that limited the sentencer's consideration of mitigating factors concerning the defendant's character, record, and offense. Under *Lockett*, individualized sentencing with consideration given to all relevant evidence proffered by the defendant concerning his character, record, and offense is essential in capital cases.

14. In *Gardner*, the trial judge had ordered a presentence investigation after the jury had returned an advisory verdict recommending a life sentence. The judge had then disclosed part, but not all, of the presentence investigation report to the defendant's counsel and, apparently on the basis of the report, had rejected the jury's advisory verdict and sentenced defendant to death. *Gardner v. Florida*, 430 U.S. at 352-53, 97 S.Ct. at 1201-1202. The *Gardner* plurality refused to approve this procedure on the basis of *Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949), which had held that due process guarantees neither a hearing nor participation by the defendant in capital sentencing. Instead the Court reaf-

firmed "its obligation to re-examine capital sentencing procedures against evolving standards of procedural fairness in a civilized society." *Gardner v. Florida*, 430 U.S. at 357, 97 S.Ct. at 1204. The Court recognized that substantial constitutional developments had occurred during the 30 years since the *Williams* case was decided and determined that those developments justified a departure from *Williams*. *Id.* at 357-62, 97 S.Ct. at 1204-1206.

15. The plurality opinion in *Gardner* expressly held that the sentencing procedure at issue violated the due process clause of the fourteenth amendment. *Gardner v. Florida*, 430 U.S. at 351-358, 97 S.Ct. at 1201, 1204. The opinion's emphasis on the difference in kind between the death penalty and other punishments, *id.* at 357-58, 97 S.Ct. at 1204, rejection of some arguments that it conceded might have merit in non-capital cases, *id.* at 360, 97 S.Ct. at 1205, and heavy reliance on *Furman* and other death penalty decisions, *id.* at 360-61, 97 S.Ct. at 1205-1206, however, indicate that the plurality's reasoning involved a cross-section of eighth amendment and due process concerns. Justice White's concurring opinion expressed the view that the procedure at issue clearly violated the eighth amendment and thus there was no need to address the due process issue. *Id.* at 362-64, 97 S.Ct. at 1206-1207 (White, J., concurring). Justice Blackmun concurred in the judgment on the basis of *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) and *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976)—decisions based on the eighth amendment. *Gardner v. Florida*, 430 U.S. at 364, 97 S.Ct. at 1207 (Blackmun, J., concurring). Justice Brennan agreed with the plurality that the procedure at issue violated the due process clause but adhered to his prior opinions stating that the death penalty violates the eighth amendment in all circumstances. *Id.* at 364-65, 97 S.Ct. at 1207-1208 (Brennan, J.).

tive difference"[16] between the death penalty and other punishments and the corresponding need to ensure that capital sentencing is "based on reason rather than caprice or emotion," *id.* at 357-58, 97 S.Ct. at 1204, and (2) the decisions holding that "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause," *id.* at 358, 97 S.Ct. at 1204. With these developments in mind, the plurality considered and rejected the state's asserted justifications for allowing imposition of the death penalty on the basis of confidential information, because the risk that confidential information "may be erroneous, or may be misinterpreted, by the investigator or by the sentencing judge, is manifest" and "the interest in reliability [in capital sentencing] plainly outweighs the State's interest in preserving the availability of [such] information." *Id.* at 360, 97 S.Ct. at 1205.[17] The plurality found the argument that trial judges should be trusted to exercise their discretion responsibly in relying on confidential information was based "on the erroneous premise that the participation of counsel is superfluous to the process of evaluating the relevance and significance of aggravating and mitigating facts" and, in any event, was clearly foreclosed by *Furman*. *Id.* at 360, 97 S.Ct. at 1205.

The majority, following the reasoning of the Florida Supreme Court, attempts to distinguish this case from *Gardner* on the ground that the confidential information in this case was considered at the appellate review stage rather than during the initial sentencing proceeding.[18] Majority Opinion,

16. *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976).

17. The state argued that confidentiality was essential to enable investigators to obtain sensitive disclosures. In addition to this contention, the plurality rejected the state's argument that full disclosure of presentence reports would cause unnecessary delay, finding that the problem had been "overstated" and observing that "if the disputed matter is of critical importance, the time invested in ascertaining the truth would surely be well spent if it makes the difference between life and death." *Id.* at 359-60, 97 S.Ct. at 1205. The state's contention that disclosure of psychiatric and psychological evaluations to the defendant could disrupt the process of rehabilitation, in the plurality's view, "has absolutely no merit in a case in which the judge has decided to sentence the defendant to death." *Id.* at 360, 97 S.Ct. at 1205.

18. The majority's broad declaration that "[t]he [appellate] court does not 'impose' sentence, and for that reason there cannot exist a due process violation under *Gardner*" indicates that its basis for distinguishing *Gardner* is not simply that it does not believe the appellate court considered nonrecord information in this case. To the extent the majority additionally relies on the Florida court's denial of petitioner's assertion that confidential information was considered and played a role in its review of sentencing decisions, I cannot agree with the majority's approach. The Florida Court received no evidence, rendered no hearing, afforded petitioners no cross-examination, and set forth no factual findings concerning the procedure at issue. In short, that part of the Florida court's opinion accepted by the majority here as a "correct [] [] description of its function" is nothing other than a conclusory declaration by the Florida court that it acted properly. Irrespective of the adequacy of the state court's handling of petitioner's constitutional claim, surely our role in reviewing the serious constitutional issue raised by this habeas petition demands more than blind acceptance of conclusory remarks made by the state court, who in essence is an adversary in this proceeding. *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981), cited by the majority, is inapposite, since it applies only to *factual* determinations made by a state court "after a hearing on the merits of a factual issue." *Id.* at 546, 101 S.Ct. at 768. *See also* 28 U.S.C. § 2254(d)(1). As noted above, the Florida court made no findings of fact but simply accepted, arguendo, the facts presented by the petitioners. Finally, I find the Florida court's assertion that nonrecord evidence plays no role in its capital sentence decisionmaking inexplicable. As Justice Marshall has noted,

> If the court does not use the disputed nonrecord information in performing its appellate function, why has it systematically sought the information? Moreover, the court intimated that it does use the information, although in an undisclosed "procedural" manner. "The 'tainted' information we are charged with receiving was . . . in every instance obtained to deal with newly articulated procedural standards." 392 So.2d at 1333, n.17. Petitioners are entitled to the assurance either that such information is not sought and placed before the court, or that its use is circumscribed by appropriate safeguards.

Brown v. Wainwright, ___ U.S. ___, 102 S.Ct. 542, 70 L.Ed.2d 407, 408 (1981) (Marshall, J., dissenting from denial of certiorari).

supra, at 443-44. The majority's argument that "there cannot exist a due process violation under *Gardner*" where the nonrecord information comes into play at the appellate level must proceed from one or both of the following premises: that rational appellate review is not an essential component of capital sentencing procedures under the eighth amendment, or that use of nonrecord information without notice to the defendant will not undermine the reliability of appellate review in the same way *Gardner* recognized it would affect the reliability of initial sentencing. Either premise is erroneous. A rational appellate review process is one of the two[19] fundamental requirements of capital sentencing procedures established by the Supreme Court's 1976 death penalty decisions. *See Woodson v. North Carolina*, 428 U.S. at 303, 305, 96 S.Ct. at 2990, 2991 (plurality opinion); *Roberts v. Louisiana*, 428 U.S. at 335 & n.11, 96 S.Ct. at 3007 & n.11 (plurality opinion). Indeed, the Court relied on the appellate review provision in upholding the Florida statute under which petitioner was sentenced, viewing it as one of the means by which the statute assured that the death penalty would not be imposed on the basis of passion, prejudice, or any other arbitrary factor. *Proffitt v. Florida*, 428 U.S. at 250-53, 258-59, 96 S.Ct. at 2965-2967, 2969. *Accord Gregg v. Georgia*, 428 U.S. at 204-06, 96 S.Ct. at 2939-2940 (Georgia statute's appellate review provision ensures that death penalty will not be imposed capriciously). *See also Gardner v. Florida*, 430 U.S. at 360-61, 97 S.Ct. at 1205-1206 (trial judge's failure to make available to appellate court information he considered in imposing sentence renders sentencing procedure invalid). The careful consideration given by the Supreme Court to the adequacy of the Florida statute's review process belies any suggestion that the Court did not consider appellate review integral to capital sentencing. *See Proffitt v. Florida*, 428 U.S. at 258-59, 96 S.Ct. at 2969. Second, the risk that an appellate court's reliance on nonrecord information, without providing notice to the defendant of the substance of that information or an opportunity to contest its accuracy, will result in the affirmance of a sentence on the basis of erroneous or misinterpreted information presents as grave a threat of the arbitrary imposition of death condemned in *Furman* as the risk involved when such a procedure is engaged in by the initial sentencer. The majority insists that there is no such risk involved here because the appellate court merely reviewed, and did not "impose," petitioner's sentence. If, in deciding to *affirm* petitioner's sentence, the Florida court reviewed and relied on undisclosed, and possibly inaccurate, information concerning petitioner's character and prison record, however, that court's disregard for the interests of petitioner and society that death sentences be predicated on reliable factfinding is no less egregious than the similar actions of the trial judge in imposing the sentence invalidated in *Gardner*. In both situations the "[a]ssurances of secrecy are conducive to the transmission of confidences which may bear no closer relation to fact than the average rumor or item of gossip"; in both the absence of defense counsel's participation precludes the adversarial debate our system recognizes as "essential to the truthseeking function." *See Gardner v. Florida*, 430 U.S. at 359, 360, 97 S.Ct. at 1205.

Nor do I consider a satisfactory explanation the Florida court's insistence that factfinding is foreign to its appellate review

19. The other requirement established in the 1976 cases having been preordained by *Furman*, was the provision of standards and procedures to limit and direct sentencer discretion. *E.g., Woodson v. North Carolina*, 428 U.S. at 303, 96 S.Ct. at 2990; *Gregg v. Georgia*, 428 U.S. at 196-98, 199, 206-07, 96 S.Ct. at 2936, 2937, 2940-2941; *Proffitt v. Florida*, 428 U.S. at 253, 258, 96 S.Ct. at 2967, 2969. A third requirement emphasized in more recent cases, which is also designed to ensure that the discretion exercised by sentencers will be an informed discretion, is that the defendant be allowed to present and have the sentencer consider evidence shedding light on his character, background, and the circumstances of the offense. *Eddings v. Oklahoma*, — U.S. —, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

function and that any nonrecord information it received was therefore superfluous to its decisions. For, notwithstanding the Florida court's attempt to deemphasize the evidentiary review aspect of its appellate function,[20] the essence of that function as recognized by the United States Supreme Court in *Proffitt v. Florida*, 428 U.S. at 253, 96 S.Ct. at 2967, is the "review[ing] and reweigh[ing]" of evidence of aggravating and mitigating circumstances "to determine independently whether the imposition of the ultimate penalty is warranted." *Id.* (citing *Songer v. State*, 322 So.2d 481, 484 (Fla.1975), *Sullivan v. State*, 303 So.2d 632, 637 (Fla.1974)).[21] It is not at all inconceivable that, in performing this function, the Florida Supreme Court might decide to sustain a sentencer's finding of aggravating circumstances on the basis of evidence that, although not before the sentencer, nonetheless supports the sentencer's finding. Such evidence, because untested by the adversary process, clearly could distort the court's appellate functions.[22] The Florida court did not deny that it systematically requested and received nonrecord information concerning capital defendants, see *Brown v. Wainwright*, 392 So.2d at 1330, 1331, moreover it essentially admitted having used the information for some purpose by its statement that "[t]he 'tainted' information we are charged with reviewing was ... in every instance obtained to deal with newly-articulated procedural standards." *Id.* at 1331 n.17. See note 19 *supra*. The mystery that the Florida Supreme Court has chosen to leave unresolved concerning the purpose of its requests for and its use of nonrecord information only underscores the need for a complete factual record in this case. If, as the majority believes, the Florida court did not seek out or consider information not contained in petitioner's record, or if its receipt and use of such material was properly circumscribed by adequate procedural safeguards, these facts would surely be brought out through discovery or an evidentiary hearing. As noted above, however, petitioner has not yet been afforded discovery nor any other method of eliciting the facts pertinent to his claim. The majority's affirmance of the district court's denial of discovery on the ground that petitioner has presented insufficient evidence places petitioner in the impossible position of having to prove his claim as a prerequisite to being allowed to gather evidence to support it. This result is not merely illogical, it could promote the conclusion that the court is more concerned with expediting its administ-

20. The Florida court suggested that the limited nature of its reviewing function—under which it "determine[s] if the jury and judge acted with procedural rectitude" and "compares the case under review with all past capital cases to determine whether or not the punishment is too great"—necessarily precluded its use, or misuse, of nonrecord information. *See Brown v. Wainwright*, 392 So.2d at 1331 n.3.

21. If the Florida Supreme Court's function in reviewing capital sentencing decisions had changed substantially since *Proffitt* was decided, that fact would call into question the continued vitality of the *Proffitt* holding—which as noted above upheld Florida's capital sentencing scheme partly on the basis of the appellate review process just described. A review of recent Florida Supreme Court decisions indicates, however, that the court does continue to review sentencer findings for evidentiary sufficiency. *E.g. McCrae v. State*, 395 So.2d 1145, 1153 (Fla.1980) (evidence sufficient to establish aggravating circumstance that crime was especially heinous and cruel); *Peek v. State*, 395 So.2d 492, 499 (Fla.1980) (evidence insufficient to establish aggravating factor that crime was committed for pecuniary gain).

22. *See also Brown v. Wainwright*, ___ U.S. ___, 102 S.Ct. 542, 544, 70 L.Ed.2d 407, 409 (1981) (Marshall, J., dissenting from denial of certiorari):

> When reviewing a sentence for procedural regularity, the court might uphold or vacate the sentence in part on grounds not considered by the trial court, or on factually erroneous grounds, because it has viewed ex parte unreliable, nonrecord information concerning the appellant. And when reviewing sentences for proportionality, the court's comparison of the sentences of other capital defendants with that of the appellant is rendered meaningless if the court has upheld or vacated the death sentences of other individuals after viewing this kind of information, or if the court used possibly erroneous information only as background data for its proportionality determination. The more systematic the practice of reviewing such information, the greater the danger of this second form of distortion.

tedly unpleasant task of reviewing state's capital sentencing decisions than it is with ensuring the reliability and consistency of those decisions as mandated by *Furman* under the eighth amendment. Respectfully I dissent.

On Rehearing

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT *, ANDERSON and CLARK, Circuit Judges.

BY THE COURT:

A majority of the Judges in active service, on the Court's own motion, having determined to have this case reheard en banc,

IT IS ORDERED that this cause shall be reheard by the Court en banc on briefs *with* oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.